



Environment  
Institute of  
Australia and  
New Zealand

# Tasmanian Divisional Newsletter

February 2011

Please enjoy this edition of the Tasmanian Divisional newsletter. We have had a great 2010 with five What's Happening In My Back Yard (WHIMBY) evening seminars (see details of the October seminar in this newsletter). We've had a great start to 2011, with one professional development seminar already under our belt and the next WHIMBY scheduled for 12pm on March 31<sup>st</sup> in Launceston focussing on air quality.

Your Tasmanian Divisional Chapter is joining the push for each Division to receive more funding from Central Operations to assist us in running local events. We will keep you informed of our progress.

A big thanks to Danielle McPhail for taking on the role of Secretary. The two roles have been a bit too much for our President, Claire Brett, to manage single-handedly.

Kathryn Pugh, Newsletter Editor

## **Green Drinks restarted for 2011 on Wed 23rd Feb 5pm**

The first Green Drinks session was held at the revamped Brunswick Hotel (67 Liverpool St). For more information, find Green Drinks on Facebook and Twitter (GDHBA).

### **John Todd's nomination for the EIANZ Mary Lou Morris Award**

John Todd, Treasurer of the Tasmanian Division, was nominated for the EIANZ Mary Lou Morris Award for Outstanding Service to a Division or Chapter last year. Although John was unsuccessful (there was tough competition), you may be interested in reading this summary of John's contribution to the Tasmanian Division so far.

John was a founding member of the Tasmanian Division of EIANZ. He has remained an active Committee member for more than 20 years, several times holding the positions of Divisional President, Vice President, Council Representative, Secretary and Treasurer. John has always sought ways of increasing the benefit of EIANZ membership to environmental professionals in Tasmania, and sees this as the best way of increasing local membership and maintaining a high profile for EIANZ in the State. He initiated the Division's Tasmanian newsletter in 2005 and has edited four out of the twelve newsletters issued to date; and he initiated the Division's mentor program in 2007.

John initiated the undergraduate and postgraduate EIANZ student awards at the University of Tasmania in 2003 and these awards have continued successfully each year. The awards are judged by EIANZ members and there are always more volunteers to be judges than are required. This program has resulted in a relatively high proportion of student members in the Division and has been a very effective way to promote the Institute to students. A number of the prize winners have continued their EIANZ membership beyond the initial complimentary period.

John has always promoted EIANZ through his professional work. He was an Associate Professor, Coordinator of Environmental Studies and Head of the School of Geography and Environmental Studies in his academic years at the University of Tasmania. Since 2002 he has been a full-time consultant and Director of Eco-Energy Options Pty Ltd.

John has been of outstanding service to the EIANZ. He has been a strong supporter of the EIANZ and has volunteered his time for the betterment of the Institute. He is one of the backbones of the Tasmanian Division and is always willing to assist.

**General Manager to Increase the Profile of EIANZ by Bill Haylock**

After an extensive planning and recruitment campaign, the Executive is pleased to welcome Monica Vandenberg as General Manager of the Environment Institute. Monica comes with extensive experience in environmental management across a diverse cross-section of the industry.

Her impressive career includes business management and development in both not-for-profit and mainstream business. Her focus will be on implementing Institute initiatives and building engagement with a shared vision across all parts and sectors of the Institute.

Monica is a specialist in sustainability management, having run her own sustainability consultancy for the past few years. She holds a Bachelor of Business, a Graduate Diploma in Management & Strategic Foresight and is a member of the Australian Institute of Company Directors.

Reporting to the Institute President and Treasurer, the General Manager role has been introduced to help deliver our most pressing initiatives (the STEP program), and help raise the profile of the Institute and Certification across Australia and New Zealand. Monica will spend the first few months in consultation with Australian Divisions, the New Zealand Chapter and our Standing Committees. The role will support the Executive and Council in high level business development, while supporting the Divisions with initiatives, strategic advice and event development.

Monica will be working out of Central Office (03 9654 7473) from 1 March 2011 and will be visiting all Divisions and Chapters over the coming months.

She can be contacted via email at [gm@eianz.org](mailto:gm@eianz.org) or on mobile 0417 336 302.

On behalf of the Executive, Council, staff and members of the Institute, we welcome Monica and wish her well in her new role.

I also want to extend a note of gratitude to all those Institute members who were involved in this detailed recruitment process.

**A personal perspective on the 2010 EIANZ Conference  
by John Todd**

In October last year I represented the Tasmanian Division at the EIANZ Council meeting in Wellington NZ. I decided to stay on for the Institute's Conference which ran for the next two days. In my many years as an academic I must have attended over 50 conferences and this one would rate amongst the best.

It is the first time I have been at an EIANZ Conference, so I wasn't too sure what to expect. As it turned out, the professional content of the papers was excellent; I like it when I pick up useful information in my own areas of interest and hear well presented papers on topics I know little about. This conference had both. The plenary sessions were very good. Sometimes at conferences the big-name speakers obviously haven't done much preparation; they rely on their reputation and a grab bag of slides from previous conference presentations. But on this occasion the plenary speakers all covered up-to-date material and succeeded in putting a very interesting slant on their field of expertise. In particular, Dr Graeme Pearman, ex-CSIRO atmospheric scientist, managed to raise some very challenging new ideas about the way we are dealing, or failing to deal, with climate change. And Marilyn Waring, a well known NZ activist, presented an equally challenging paper on human rights and the environment.

It is always tricky to pick which of the parallel sessions to attend at conferences. Too often I seem to pick the sessions with a string of boring, poorly presented papers and then at morning or afternoon tea listen to other delegates saying what an exciting session they had just been to. This time I picked well (or perhaps they were all good). I heard some very interesting papers on NZ's approach to air pollution control and some technical papers on measurement of smoke from wood-burning heaters - this was very useful for me. There were also good papers on sustainability, wicked environmental problems and community action.

On top of the high quality of the professional content there was good opportunity for networking and an excellent conference dinner. All this for the very reasonable price of about (AUD)\$450. So if you get the chance, I thoroughly recommend you consider attending an EIANZ Conference. The next will be in Brisbane, check out the EIANZ web page.

**Upcoming Events:**

**Professor Garnaut's Lecture – Thurs 10<sup>th</sup> March 6pm**

Professor Ross Garnaut will launch his fifth update paper on Thursday 10<sup>th</sup> March at the Stanley Burbury Theatre, University of Tasmania. The presentation will examine the data on temperature, sea level rise and extreme events from recent years in the context of longer term climate change trends. No registration is required.

**WMAA "Waste Management and Beyond" Seminar - Fri 11<sup>th</sup> March 12pm**

This seminar brings together some of Australia's leading experts to outline some recent local developments that will lead Tasmania onto a sustainable footing. Register at [www.wmaa.asn.au](http://www.wmaa.asn.au)

**EIANZ Launceston Air Quality Seminar – Thurs 31<sup>st</sup> March 12pm to 2pm**

This seminar will feature presentations from the Environment Division of DPIPW and Dr James Markos, Respiratory Physician. More details to come!



**WHIMBY (What's Happening In My Back Yard) Seminar**

**Wed 27<sup>th</sup> October 2010 - Cadbury and Nyrstar**

by Claire Brett

The audience of around twenty people was treated to an evening of chocolate (of course), lots of Key Performance Indicators and a video showing the inside of one of Nyrstar's bores.

**Cadbury**

Clinton Luckock, Environmental Specialist, Cadbury, opened the evening with an in-depth presentation on Cadbury's impressive KPI reporting system. Various parameters are tracked around waste generation, recycling, waste water volumes and quality, water use and greenhouse gases. Much of these data are presented graphically on the Environment Information Notice Board, located deliberately, sneakily and cleverly on the way to the canteen! Cadbury is making ongoing improvements to the equipment on site to reduce its environmental impact. Cadbury has set a target of a 50% reduction in CO<sub>2</sub> emissions by 2020 (compared with 2006) and has set an interim target of 15%.

Cadbury has had an ongoing program to upgrade equipment and machinery resulting in lower energy use and hence greenhouse gas emissions. Cadbury is in the process of converting the coal fired boiler to natural gas. This is expected to reduce CO<sub>2</sub> equivalents by 7,900 Tonnes per annum. This project will avoid the need for water to cool the ash and hence water use will be cut by 360 kilolitres per annum.



Another project will involve reprogramming the finished product conveyors to operate only on demand. This should reduce energy by 188 MWh per year.

### **Nyrstar**

Todd Milne, Nyrstar, provided an overview of the significant historical contamination of soil and groundwater on and off the site. Historically stockpiles of material were kept out in the open so any wind would spread this material around the area. In 2009 Nyrstar installed a series of horizontal finger bores to drain the ground water and treat it at the onsite treatment plant. This has resulted in a four metre drop in the water table height and around 50 tonnes of zinc being recovered.



In collaboration with the Glenorchy City Council, a 22ML retention basin will be installed under the Moonah Primary School to collect stormwater. This water will be fed to Nyrstar and will replace potable water. Nyrstar proposes to treat the water in a distillation column fed with low pressure steam. This project will result in a significant reduction in the potable water used at the site.

Matthew Meere, Nyrstar, outlined the air quality issues at the site. An electrostatic precipitator on the foreshore sulfur dioxide scrubber was installed recently to reduce sulfur emissions. In addition, continuous particulate monitoring on baghouses has been installed. There is a network of high volume and TEOM dust samplers on and off site to monitor dust concentrations. Also Nyrstar has an active dust management plan in place to reduce dust emissions from the site.

A big thank you to Clinton, Todd and Matthew for their presentations.

## **Professional Development Seminar**

### **“Environmental Consulting and the Law”**

**Wed 16<sup>th</sup> February – The Duke of Wellington Hotel**

by Claire Brett

This seminar explored the NSW case where an environmental consulting company Orogen Pty Ltd and its director Mr Fish were convicted of an offence under the *National Parks and Wildlife Act 1974* for causing damage to threatened species habitat (koala). Although the consultant did not actually commit the act of clearing the vegetation, their advice resulted in its removal and hence they were found to have caused the removal. This is the first known case of its type in Australia where an environmental consultant has been prosecuted (usually the landowner or developer or contractor would be pursued in the first instance).



The seminar featured presentations from Claire Smith, Partner at Clayton Utz based in NSW (left), Don Armstrong, Barrister & Solicitor, Private Practice in Battery Point (middle) and Leonard Fernandez, based at the Salamanca Chambers, in Salamanca (right).

The facts of the case were as follows:

- A developer engaged Mr Fish to advise on the removal of vegetation for a new industrial lot in NSW which was about 10 hectares in size. It was a mixture of 4a industrial zoned land and 1a rural zoned land.
- Mr Fish conducted an environmental assessment and found a koala habitat corridor within the lot.
- Mr Fish subsequently set up his own consulting company, Orogen Pty Ltd. In its fee proposal, Orogen accepted responsibility for ensuring "legislative compliance" in respect of the clearing works.
- Mr Fish provided the advice that no consent was needed when clearing vegetation on industrial zoned land nor when clearing "non-protected regrowth" on 1a rural zoned land, as per the *Native Vegetation Act 2003* (NV Act). In reaching this conclusion, Mr Fish reviewed online documentation prepared by the Department of Environment and Climate Change and consulted with the local Catchment Management Authority and the local Council. However, Mr Fish did not identify that it is an offence to damage any habitat of a threatened species under the *National Parks and Wildlife Act 1974* (NPW Act). There are a number of defences for this offence (eg the clearing of non native vegetation which is permitted under the NV Act) however the defences do not apply to industrial land. Hence the removal of any vegetation, regrowth or not, on industrial zoned land without the required authorisation was unlawful.
- Mr Fish hired an expert arborist to give general advice as to whether vegetation on the rural zoned land contained non-protected regrowth for the purposes of section 19 of the NV Act. It concluded that although some non-protected regrowth was present, the land also contained mature trees which could not be cleared until the required authorisation was received. The report was then used by Orogen to determine which trees should be tagged as non-protected regrowth and which trees should be tagged as protected. The report was not designed to be used for this purpose and gave no clear guidance as to which specific trees should be tagged. The report only related to land zoned rural 1A and not to the land zoned industrial.
- Orogen employed an ecologist to tag non-protected regrowth (which Mr Fish had previously advised could be lawfully removed from rural land). The ecologist did not have expertise in this area. It was the first time he had ever been asked to judge the age of vegetation to identify regrowth.
- The trees were then removed by a contractor. Orogen were not on site during the operations.

- Mr Fish and Orogen were charged under the NPW Act for causing damage to the habitat of a threatened species. He pleaded guilty to the charge. The judge considered that the offence was on the low side of culpability given that Mr Fish showed remorse and there was no deliberate intent. She also noted that the legislation surrounding the removal of vegetation was confusing as it was part of three different Acts and the Department's own factsheets did not identify how the Acts interacted.
- Mr Fish was fined \$5,000 and Orogen \$10,000. The maximum penalty is \$110,000 or 1 year imprisonment. Mr Fish and Orogen were ordered to pay the prosecution costs of \$105,000, to undertake a koala habitat mapping project at an approximate cost of \$150,000 (Orogen offered to carry out this project and it was accepted by the Court) and was ordered to put advertisements in the Sydney Morning Herald and the newsletter of the Ecological Consultants Association of NSW.

#### **What could Mr Fish/Orogen have done differently?**

- Orogen could have undertaken a full and comprehensive legislative review at the initial stage to identify the links between the different legislation. Given the complex nature of the legislation, it may have been prudent for the developer or consultant to engage a lawyer to provide legal advice.
- Rather than agreeing to ensure "legislative compliance" for the clearing works, Orogen could have limited their scope of works to particular legislation.
- Orogen should not have used the expert arborist's report in a way that it was not intended to be used.
- Orogen should not have hired an inexperienced ecologist without the necessary skills to perform the task.

#### **What sets this case apart?**

This case is the first known case in Australia where the definition of "cause" environmental damage has been expanded to include indirectly causing damage due to incorrect advice of a consultant. Typically in this situation legal proceedings would be undertaken against the developer or the tree removal contractor or landowner.

Since this case was concluded, there have been two examples where the expanded definition of "cause" has been adopted. In one case, an interior decorator was prosecuted (as well as the builder) relating to the complete demolition of a house that was subject to heritage protection provisions.

**What can environmental consultants do to protect themselves?**

- Limit the scope of works as much as possible. Limit the work to providing factual and technical information where possible and take care when interpreting legislation. Technically under the *Legal Profession Act 2004* (NSW), only legal practitioners can engage in legal practice.
- Do not agree to ensure “legislative compliance”. By doing so, Orogen accepted an enormous amount of responsibility to identify and interpret various pieces of legislation. Ultimately this proved to be beyond their expertise as they failed to appreciate the links between the three different Acts. In this situation, instead of offering full legal compliance, Orogen could have agreed to identify areas of non-protected regrowth under the NV Act and koala habitat under the TSC Act. The advice becomes factual and technical information and does not delve into the grey area of providing legal advice and interpretation.
- Ensure that the Terms and Conditions are agreed to prior to being engaged by a client. Consider getting legal advice and do not blindly accept the standard Terms and Conditions of your client. The Terms and Conditions should include the scope of works, responsibilities of each party, limits of liability and it is good practice to also include project stages and timings. Aim to achieve a reasonable balance.
- Maintain appropriate Professional Indemnity insurance. Note, under the *Competition and Consumer Act 2010* (Commonwealth), if the value of the services is under \$40,000, then there is a limit of liability equal to the value of the contract. Note, of the Professional Indemnity policies reviewed (including the standard policy provided by Marsh to EIANZ members), no policies provided coverage for criminal proceedings (prosecution under Acts/regulations) as in this case. The policies only provided coverage for civil proceedings (eg disputes between a client and consultants). However, the likelihood of being subject to civil proceedings is much higher than criminal proceedings.
- Do not consult outside your area of expertise. Ensure you have appropriate internal procedures to ensure that personnel working on projects have sufficient skills and experience. Note, some clients are now specifying which people within a consulting firm can work on the project. Engage other consultants if part of the work is outside your area of expertise.
- Realise that you cannot rely on the disclaimer in the report and that you can still be prosecuted for giving incorrect advice.

### **What are the lessons for people who engage environmental consultants?**

- Be clear about the scope of services sought and document this in the Terms and Conditions.
- Check the qualifications and experience of environmental consultants and insist that those persons perform the work.
- Be clear whether or not you warrant reliability of information supplied to the consultant.
- Do not accept the consultant's standard contract.
- Beware of limitations in reports and ensure that the limitation/disclaimer is consistent with the Terms and Conditions agreed up front.

### **Environment Law in Tasmania**

The key environmental legislation in Tasmania is the *Environmental Management and Pollution Control Act* (EMPCA). The Act defines environmental harm as "any adverse effect on the environment (of whatever degree or duration) and includes environmental nuisance". The Act defines environmental nuisance as "the emission of a pollutant that unreasonably interferes with, or is likely to unreasonably interfere with, a person's enjoyment of the environment".

Under Section 53, a person who wilfully and unlawfully causes an environmental nuisance is guilty of an offence. The maximum penalty is 300 penalty units or \$39,000. Similarly, under Section 50, a person who "causes serious environment harm" is guilty of an offence. The maximum penalty for a body corporate is \$1.3 million or for a natural person, \$325,000 or 4 years imprisonment (or both).

As the definition of "cause" has now been expanded in the Fish/Orogen case, an environmental consultant, who gives incorrect advice which leads to environmental harm or an environmental nuisance, could be open to prosecution. As noted above, the penalties in Tasmania are not insignificant.

A big thank you to Claire, Don and Leonard for an informative seminar.

Please note, the material in this summary are one person's summary of the discussions at the seminar. It is not legal advice and should not be relied upon as such.