Offensive Trades: *Ammendment to the Health Act 1911 (WA)*

by **Michael Bennett,** Principle Solicitor, Environmental Defender's Office (WA)

The establishment and operations of "offensive trades" are subject to regulation under the *Health Act 1911* (WA). On 14 November 2000, the Western Australian Government, through a proclamation by the Governor, deleted a part of Schedule 2 of the *Health Act* which defines the term "offensive trade" (Government Gazette, 17 November 2000 at p.6289).

The deletion was affected under section 186(2) of the *Health Act*, a "Henry VIII" clause which provides that: "the Governor may by proclamation ... amend Schedule 2 by deleting therefrom any of the trades specified therein."

As it stood prior to the amendment, Schedule 2 of the *Health Act* essentially defined "offensive trade" to mean:

> (iv) A series of specific, listed works and establishments, such as abattoirs, fish curing establishments and manure works;
>
> (ii) Any trade, business, process or manufacture whatsoever causing effluvia, offensive fumes, vapours or gases, or discharging dust, foul liquid, blood or other impurity;
>
> (iii) Any noxious or offensive trade, business or manufacture; and
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> (iv) Any trade that, unless preventative measures are adopted, may become a nuisance to the health of the inhabitants of the district.

The proclamation purported to delete the latter three categories of "offensive trade", apparently in response to an earlier decision of the Supreme Court of Western Australia which found that a particular proposed brickworks fell within the meaning of the term as defined in Schedule 2. (Re Shire of Swan; ex parte Saracen Properties Pty Ltd [1999] WASCA 135)

In that case a proposed brick and tile processing plant was refused planning approval on the grounds that it was a "noxious industry", which by definition is a prohibited use in industrial development zones under the Swan Shire's Town Planning Scheme. The Scheme defined "noxious industries" by reference to the definition of "offensive trade" contained in the *Health Act*.

The proposal had already been assessed under the *Environmental Protection Act 1986* (WA). The Environmental Protection Authority (EPA) had concluded that the proposal could be managed to meet the EPA's objectives and would not have an unacceptable environmental impact provided the applicant's commitments, and the EPA's recommended conditions of approval, were implemented.

The applicants sought a writ of certiorari in relation to the Shire's refusal to grant planning approval on the grounds that the proposal constituted a well recognised and traditional type of industry, which was not noxious industry. They were unsuccessful in their application.

In the writer's opinion, it is unfortunate that the WA Government chose to amend the Health Act via section 186(2), thus without Parliamentary scrutiny and without inviting public comment on the amendment. There may well have been a case for limiting the scope of the "offensive trade" definition in the *Health Act* in view of the overlap between those provisions and the pollution licensing provisions of the *Environmental Protection Act*. However, it does not foster public confidence in government for provisions in a statute protecting public health, to be deleted without public consultation, particularly when it was seemingly in response to a judicial decision which prevented a controversial development from proceeding.

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Infocus *with the Hon Wilson Tuckey MP*

Combating illegal fishing in Australia's EEZ

BACKGROUND

Illegal, unauthorised and unregulated fishing (IUU) is a growing threat to the world's fisheries. In March this year the Food and Agriculture Organisation (FAO) adopted an International Plan of Action to combat IUU. Whilst Australia has the third largest EEZ, the waters are nutrient poor and therefore not overly abundant. Hence the need to manage the fish stocks within our waters with care and an eye on sustainability. Further, the remote nature of our Southern Ocean fisheries makes them an easy target for IUU.

On 12th April 2001, Australian Defence Personnel (with the assistance of their South African counterparts) apprehended and boarded the *South Tomi*, a fishing vessel detected fishing illegally in Australian waters off Heard and McDonald Islands. The arrest was significant for a number of factors including:

- the length of the chase across the South Indian Ocean. A distance of some 6100 km, makes it one of the longest 'hot pursuits' on record.
- international cooperation from both the French and South African Governments were vital to securing the vessel's arrest
- the message sent to other would be illegal fishers.

STRONG MESSAGE TO ILLEGAL FISHERMEN

I recently spoke with the Minister responsible for Fisheries, the Hon Wilson Tuckey about the arrest. Minister Tuckey stated that it sent a clear message to foreign fishing nations entertaining the idea of fishing illegally in our waters. The message being that "Australian authorities will detect them, persue them and catch them, even when they attempt to flee." The international cooperation received from South Africa (by way of a Naval vessel) indicates the effective working relationship that has been forged between the two nations and the joint commitment to combating IUU. France was also prepared to support when it initially appeared the *South Tomi* may have been making for French waters off the Kerguelen Islands.

FUTURE MANAGEMENT

In terms of future international cooperation, Minister Tuckey favours a United Nations styled Commission formed by South Indian Ocean rim countries (e.g. Australia, South Africa, France) which would oversee an ocean marine reserve with the dual purpose of resource and environmental management. Rights of northern hemisphere nations traditionally involved in fishing within the Commission area would be recognised, but only in so far as those nations complied with catch limits and environmental controls.

The creation of a Regional Fishery Organisation (RFO) to manage fish stocks in areas of high seas in both the South Indian and Southern Oceans has appeal. RFO's are the favoured mechanism for achieving cooperation in fisheries management (see UNCLOS 1982, UNFSA 1995) and Minister Tuckey sees that such an RFO in the Southern oceans could complement existing commissions such as CCAMLR, CSBFT.

SURVEILLANCE

Minister Tuckey also spoke about future surveillance of the Australian EEZ in remote areas. He has floated the possibility of acquiring a tender vessel (a type of mothership in laymen's terms) to support patrol vessels such as the *Southern Supporter* (which initially spotted the *South Tomi* off HMI). Together with satellite information this would greatly extend the range

and capability of patrol vessels to conduct surveillance. The tender could also have helicopter capacity to allow for surprise boardings and the apprehension of offending vessels. It certainly seems more practical than the idea of setting up a permanent base at HMI.

In concluding, Minister Tuckey reiterated the Government's commitment to detering illegal fishing in Australian waters. With reference to the arrest of the *South Tomi* and the charges laid against the Ship's Master, Minister Tuckey stated he would support any measures to toughen up Australia's domestic laws against illegal fishers if this was warranted.

Rachel Baird, NELR National Editor

International Law and Fisheries Management is particularly prone to acronyms:

EEZ	Exclusive Economic Zone
HMI	Heard and McDonald Islands
UNCLOS	United Nations Convention of the Law of the Sea 1982
UNFSA	United Nations Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks
CCAMLR	Convention for the Conservation of Antarctic Marine Living Resources
CSBFT	Convention for Southern Blue Fin Tuna
IUU	Illegal, Unauthorised, Unregulated Fishing
IPOA	International Plan of Action

Gerry Bates Essay Prize

The NELA Student Prize has been renamed the **Gerry Bates Essay Prize** in honour of Dr Gerry Bates, a founding member of NELA. It an award for the best environmental law essay written during 2001 by a student enrolled in an undergraduate course at an Australian tertiary institute.

Dr Bates is a past President of NELA, and has been involved with the publication of NELR (or AELN as it was formerly named) for many years. He is the past judge of the NELA Student Prize.

CRITERIA:

1. The Gerry Bates Essay Prize is open to any undergraduate student who has written an essay for an environmental law subject taught at an Australian tertiary institution.
2. The length of the essay must be between 3,000-5,000 words.
3. The essay must be annotated by the student's lecturer/course co-ordinator as one which meets criterion 1.
4. The essay must be received at the NELA Secretariat office by last mail or COB Monday 19 November 2001.

JUDGE: The essay competition will be judge by Mr Greg McIntyre, a past President and current National Executive committee member of NELA.

THE PRIZE:

- Airfare and registration for the 2002 NELA Conference being hosted and organised by the Victorian Division of NELA
- Publication of winning essay in the first edition of the Review for 2002.

More information to assist you in the submission of your essays will be included in the September edition of the Review.