

# ACCESS TO ENVIRONMENTAL JUSTICE

**FELICITY MILLNER\***

*Environmental justice is an important aspect of social justice. Regulation of the environment and decisions about development and environmental policy impact upon our quality of life by influencing and affecting our health, as well as that of our urban and natural environments, and the availability of and access to natural resources. Disadvantaged members of society typically bear the brunt of the environmental impacts of human activity. Therefore, an essential part of attaining social justice is enabling the members of the community who will be adversely affected by these impacts to participate in and have rights of review in relation to the making of environmental laws, decisions about land use and development and enforcement of environmental laws.*

## I INTRODUCTION

Environmental justice is often overlooked in discussions about social justice. At one level this makes sense because the significance of the environment to people's wellbeing is not as immediately obvious as other social problems such as unemployment, the breakdown of families, violence in communities and the denial of basic rights and equities. For this reason, without wanting to generalise too much, one might say that environmental concerns have typically been taken most seriously in Australia by white, middle-class people who are educated and have time and resources to devote to pursuing environmental matters. This generalisation is broadly consistent with my experience in practising environmental law.

The fact that environmental justice has not been a primary concern of disadvantaged people arguably makes environmental justice more important from a social justice perspective. Regulation of the environment, and decisions about development and environmental policy, impact upon our quality of life by influencing and affecting our health as well as that of our urban and natural environments. Such decisions also affect availability of and access to natural resources. Arguably, because of a lack of environmental

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\* Principal Solicitor, Environment Defenders Office (Vic) Limited, Melbourne, Australia.

justice, disadvantaged communities and members of society typically bear the brunt of the environmental risk and impacts of human activity.<sup>1</sup> This may become even more the case when climate change impacts intensify, as discussed below.

Therefore, an essential part of attaining social justice is enabling the members of the community who will be adversely affected by these impacts to participate in, influence, and have rights of review in relation to, the making of environmental laws, decisions about land use, and development and enforcement of environmental laws.

## II WHAT IS ENVIRONMENTAL JUSTICE?

Environmental justice requires: that people who will be impacted upon by decisions about the environment have the right to participate in those decisions and have their views and concerns genuinely taken into account; that environmental laws and regulations be properly and fairly applied and enforced; and that environmental risk be distributed fairly throughout society.<sup>2</sup> One definition of environmental justice that demonstrates its many aspects is:

1. **Recognition** of the expanded moral community that is affected by ecological risk;
2. **Participation** and critical deliberation by citizens and representatives of the larger community-at-risk in all environmental decision-making;
3. **Precaution** to ensure the minimisation of risk in relation to the larger community;
4. **Fair distribution** of those risks; and

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<sup>1</sup> Robyn Eckersley, 'The State and Access to Environmental Justice: From Liberal Democracy to Ecological Democracy' (Paper presented at Environment Defenders Office, Western Australia, Perth, 20 February 2004) 3.

<sup>2</sup> Robert Bullard, 'Environmental Justice: Strategies for Creating Healthy and Sustainable Communities' (Lecture given at Mercer University, Atlanta, 20 January 1999) <<http://www2.law.mercer.edu/elaw/rbullard.htm#tr>>.

5. **Redress and compensation** for those parties who suffer the effects of ecological problems.<sup>3</sup>

Environmental justice can broadly be seen as having two main elements. The first relates to how environmental risk, including the risk caused by polluting and harmful industries, is distributed. The second relates to the opportunities that the public has to participate in decisions about the environment.<sup>4</sup> This paper will discuss *access* to environmental justice, focusing on the second element mentioned above. It will specifically discuss opportunities for the public 1) to be informed of and participate in decisions that will have environmental impacts or create risks of environmental harm, and 2) to take action in the event that someone breaches an environmental law, causing harm or a risk of harm to the environment.

Many Australian environmental and planning laws allow for some level of public participation prior to a decision being made. How effective that participation is in influencing environmental decision-making depends on two main factors:

1. the extent and nature of opportunities for participation by the public in decisions relating to the environment, and the extent and nature of opportunities for the public to seek redress when the environment has been harmed or is at risk of being harmed ('procedural access to environmental justice'); and
2. the ability of individuals and communities to access opportunities for participation ('substantive access to environmental justice').

### III WHY IS ENVIRONMENTAL JUSTICE IMPORTANT?

A healthy and clean environment is essential to the health and wellbeing of individuals and communities. Access to natural resources such as clean water and productive land is also critical to human health and welfare. Important social and economic rights such as the right to health and the right to water

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<sup>3</sup> David Schlosberg, *Environmental Justice and the New Pluralism: The Challenge of Difference for Environmentalism* (Oxford University Press, 1999).

<sup>4</sup> Elisa Arcioni and Glenn Mitchell, 'Environmental Justice in Australia: When the RATS Became IRATE' (2005) 14(3) *Environmental Politics* 363.

are recognised as being intrinsically linked to the right to a clean and healthy environment.<sup>5</sup>

The distribution of the dirtiest and most environmentally harmful operations in poorer, more socially disadvantaged areas can be seen locally, regionally, nationally and internationally.<sup>6</sup> There is considerable academic study in the USA relating to the fact that toxic industries are unfairly distributed in poorer areas, predominately populated by people from lower socio-economic backgrounds.<sup>7</sup>

One only needs to look at the location of toxic and hazardous waste sites in Victoria to find a demonstration of this. These are located in areas such as Tullamarine, Lyndhurst and Cranbourne. These three sites have received or receive toxic and hazardous waste from around Victoria. All these areas are reasonably densely populated and have established residential areas. One common denominator in these areas is that they have populations of lower socio-economic status and relatively high levels of unemployment.<sup>8</sup> Communities near these hazardous waste dumps are increasingly concerned about the impacts that the dumps are having on their health and local environments,<sup>9</sup> but have limited ability to participate in decisions about the how the waste will be handled in future.

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<sup>5</sup> Kristy Ruddock and Felicity Millner, 'Can We Eat Coal? Human Rights and Coal Mining' (2008) 86 *IMPACT!* 7.

<sup>6</sup> Eckersley, above n 1

<sup>7</sup> See, eg, United States General Accounting Office, 'Siting of Hazardous Waste Landfills and their Correlation with Racial and Economic Status of Surrounding Communities' (Report GAO/RCED-83-168, US General Accounting Office, 1 June 1983); R Gregory Roberts, 'Environmental Justice and Community Empowerment: Learning from the Civil Rights Movement' (1999) 48 *American University Law Review* 229.

<sup>8</sup> Lyndhurst landfill is located in the Greater Dandenong region. In the 2006 Socio-Economic Indexes for Areas (SEIFA) prepared by the Australian Bureau of Statistics, Greater Dandenong had the lowest score (893.9) in Melbourne; 52.2 per cent of the population earned a low income and unemployment was at 12.2 per cent. Hume, where Tullamarine Landfill is located, had the fourth lowest score (965.2) in Melbourne in 2006, and Casey, where the Cranbourne landfill is, had the 11<sup>th</sup> lowest score (1012.3) in Melbourne (which is below average) with 42.2 per cent of the population in the low income category.

<sup>9</sup> Mary Bollings, 'Residents Sick of Being Dumped On', the *Herald Sun* (online), 10 January 2007 <<http://www.heraldsun.com.au/news/victoria/residents-sick-of-being-dumped-on/story-e6frf7kx-111112805999>>; Western Region Environment Centre, *Tullamarine Toxic Dump*, Western Region Environment Centre <[http://www.envirowest.org.au/index.php?option=com\\_content&view=article&id=169:tullamarine-toxic-dump-trial-2&catid=48:background&Itemid=109](http://www.envirowest.org.au/index.php?option=com_content&view=article&id=169:tullamarine-toxic-dump-trial-2&catid=48:background&Itemid=109)>.

Another pertinent example of this is the proposed nuclear waste dump at Muckaty Station in the Northern Territory.<sup>10</sup> The dump is proposed on a remote part of the country on land owned by one of Australia's most disadvantaged groups, aboriginal Australians. Federal Court proceedings against the Northern Land Council and the Commonwealth Government have been commenced by traditional owners, who will be arguing that they were not properly consulted before the site was nominated for a nuclear waste dump.<sup>11</sup> This demonstrates that there may have already been a failure to provide access to environmental justice in this case.

If disadvantaged groups are to be able to have a say in what happens to their environment and to get information about the risks and impacts of the decisions — including risks to their health, degradation of the environment, and loss of access to resources — then access to environmental justice is essential. It is hoped that providing access to environmental justice will mean that communities which are affected by existing activities that carry environmental risks, or communities which choose to accept risky activities on economic or social grounds, are aware of the trade-offs and risks. It should also mean that decision makers are required to take the concerns of the community into account and attempt to address them.

Enforcement of breaches of environmental law and recompense for those whose environments have been harmed are also essential components of environmental justice. For a society to be just, its laws must be applied effectively, fairly and equally to all. In addition, adequate enforcement is necessary to ensure the legitimacy of the decision-making process. This is because, if public concerns about environmental risk are addressed through the placing of conditions on the operation of industry, but these conditions are then not enforced, the value of public participation and eventually people's willingness to be involved will be undermined.

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<sup>10</sup> Australian Broadcasting Corporation, 'Muckaty Station Nuclear Waste Site', 7.30 NT, 27 February 2010 <<http://www.abc.net.au/news/video/2010/02/26/2831831.htm>>.

<sup>11</sup> Maurice Blackburn Lawyers, 'Indigenous Owners Launch Legal Challenge over Australia's First Nuclear Waste Dump', 3 June 2010 <<http://www.mauriceblackburn.com.au/news/press-releases--announcements/2010/indigenous-owners-launch-federal-legal-challenge-over-australia%E2%80%99s-first-nuclear-waste-dump.aspx>> and Maurice Blackburn Lawyers, 'Fresh Evidence Boosts Traditional Owners Legal Challenge to Muckaty Station Nuclear Waste Dump', 9 May 2011 <<http://www.mauriceblackburn.com.au/news/press-releases--announcements/2011/fresh-evidence-boosts-traditional-owners-legal-challenge-to-muckaty-station-nuclear-waste-dump.aspx>>.

Too often in Australia, environmental laws are not enforced by regulatory agencies.<sup>12</sup> A recent instance where inadequacy of enforcement was highlighted was in a review by the Victorian Auditor General of the Environment Protection Authority's (EPA) handling of hazardous waste management in Victoria. The Auditor-General delivered a damning report on the EPA, stating that the enforcement practices of the EPA were 'concerning' and that no assurances could be given in relation to the effectiveness, timeliness or appropriateness of the EPA's enforcement action in respect to hazardous waste.<sup>13</sup> Communities suffer the consequences and risks of industries' non-compliance with environmental laws and regulations and the regulatory agencies' failure to uphold them.

#### IV PROCEDURAL ACCESS TO ENVIRONMENTAL JUSTICE

'Procedural environmental justice' basically refers to the existence of laws that provide for public participation in environmental decision-making and for the enforcement of environmental decisions. Laws about notice, access to information, consultation, and standing to bring court proceedings are important in an environmental law context.<sup>14</sup>

##### A Notice

Logically, notice is the first aspect of procedural environmental justice that needs to be addressed. It almost goes without saying that the public cannot participate in decisions that will have environmental impacts or create environmental risk if it is not aware that they are going to be made. Different jurisdictions and legal regimes have differing requirements in relation to notice.<sup>15</sup> Methods of notice such as advertisements in local newspapers and noticeable signs on the site, in conjunction with letters to those affected are

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<sup>12</sup> Jeff Smith, 'The Changing Nature of Public Interest Environmental Law', (Paper presented at Enterprise Sustainability Conference, Sydney, 2 June 2004) <<http://www.edo.org.au/edonsw/site/pdf/presentations/publicpartic.pdf>>.

<sup>13</sup> Victorian Auditor-General, 'Hazardous Waste Management' (Victorian Auditor-General's Report No 315, Victorian Auditor-General's Office, June 2010).

<sup>14</sup> Smith, above n 12.

<sup>15</sup> Compare, for example, the Victorian *Planning and Environment Act 1987*, which requires notices of development to be placed in a local paper, on the site, or delivered to affected persons (s 52), the *Environment Protection Act 1970* (Vic) which requires that notice of an application for a works approval be published in a statewide newspaper, and the Federal *Environment Protection and Biodiversity Conservation Act 1999* which requires notice of an application to be placed on the website of the Department of Sustainability, Environment, Water, Population and Community for 10 days.

preferable, as these methods of notice are more likely to bring the application for an activity that will impact upon the environment or create environmental risk to the attention of those who may be impacted. Ideally, notice should be clear and easy to understand and contain sufficient information about the application for members of the public to be able to understand the implications of the application. Methods such as that employed by the federal Department of Sustainability, Environment, Water, Population and Communities, which involves putting an application on its website for 10 days, are not adequate to facilitate access to environmental justice. Only people with an ongoing involvement in the issue, regular access to the internet and a reasonably high level of understanding about environmental assessment processes would become aware of these applications. During the course of my practice, I have witnessed many individuals becoming aware of their right to participate in, or seek review of, a decision after the expiry of the time limit for them to participate. This was because, although the legal requirements for notice had been complied with by the relevant authority, the individuals did not become aware of the decision or application.

## **B Consultation**

Once notice of an application has been given, access to justice requires that the public be meaningfully consulted. It requires that the public be provided with sufficient information, presented in a sufficiently clear manner, to be able to understand the environmental decision to be made and the risks that would flow from that decision. In addition, consultation must be two-way. In other words, consultation cannot involve merely telling the public about the proposal. It must also involve meaningful exchanges between the decision-maker and the public, with the possibility that the input of the public can influence the ultimate decision.<sup>16</sup> Genuine attempts to address public concerns should be made. In the event that concerns cannot be addressed, appropriate weight is to be given to these concerns when the decision is ultimately made. As a result, some applications would be refused for a failure to address these concerns.

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<sup>16</sup> Australian and New Zealand Environment and Conservation Council and National Advisory Body and Scheduled Wastes Management Group, 'A Case Study of Problem Solving through Effective Community Consultation', July 2000 <<http://www.environment.gov.au/settlements/publications/chemicals/scheduled-waste/community-consultation.html#conclusions>>.

### **C Access to Information**

The giving of access to information about a particular development or government process is an important adjunct to effective consultation. People need access to information about government processes such as policy development or environmental impact assessment, in order that they can understand ‘why’ and ‘how’ decisions are made and then participate in that process. Inadequate access to information can be a significant impediment to consultation because the public is prevented from being privy to the matters considered by the decision-maker, and is thereby unable to criticise or comment on the basis upon which the decision was made. Therefore, Freedom of Information laws, and government policy on disclosure of information that encourages openness and transparency, are critical in providing access to environmental justice.<sup>17</sup>

The ability to gain access to information is also important if the public is to be able to participate in the non-legislative and informal processes concerned with environmental decision-making. These might include protest, self-education, community education and other means of influencing and engaging in public debate to try to influence decision-making and environmental outcomes.<sup>18</sup>

### **D Review by Courts and Tribunals**

A right of merits and judicial review, as well as a right to enforce breaches of environmental laws, are all essential in ensuring access to environmental justice. Merits review enables independent, expert review of the benefits and impacts of a development or other decision. It also provides some means of ensuring that decisions — made by government, statutory authorities and Councils — that do not give due weight to environmental factors can be reviewed by an independent expert tribunal.<sup>19</sup> Judicial review<sup>20</sup> is integral to

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<sup>17</sup> As an example, the EDO Victoria has recently been involved in a series of reviews in VCAT under the *Freedom of Information Act 1982* because relevant government agencies have not determined requests in time, have not done adequate searches of government repositories or have claimed exemptions over documents that relate to significant environmental decisions.

<sup>18</sup> Arcioni and Mitchell, above n 4.

<sup>19</sup> The role of the court or tribunal in merits review is to reconsider the decision afresh, providing a check that all matters relevant to the decision have been adequately considered and environmental risks are adequately checked. For further discussion see Brian Preston, ‘The Role of Public Interest in Environmental Litigation’ (2006) 23 *Environment and Planning Law Journal* 337.

<sup>20</sup> Judicial review is the ability of a court to review actions and decisions by the executive, in terms of whether those actions and decisions are lawful.



upholding the rule of law. It is also an important mechanism to ensure that meaningful notice and consultation occur, in the event that they are required by the relevant laws. Finally, a right to bring enforcement proceedings is essential if people are to have access to justice, as it gives those affected, or potentially affected, by breaches of environmental laws the opportunity to do something about the breach and minimise the damage done to their environment, health and community in the event that regulatory agencies do not properly enforce the laws.

### **E Standing**

Standing to bring proceedings in courts and tribunals is also a very important element in access to environmental justice. Typically, in other areas of social justice law, individual rights are affected by bad government policy or decisions. As a result, the people impacted upon by the action or decision usually have standing to bring proceedings to seek to uphold their rights. However, in the vast majority of cases involving impacts on the environment, it is difficult to isolate who is more impacted upon by the relevant decision and to show that people's proprietary and other interests are affected to a sufficient degree to warrant them being granted standing.

Laws on standing — either in relation to the review of decisions about the environment or the enforcement of environmental laws — vary between jurisdictions within Australia. New South Wales and Queensland have largely open standing<sup>21</sup> for judicial review and enforcement of most environmental law matters.<sup>22</sup> Victoria has an extended right of merits review<sup>23</sup> and open standing in the enforcement of planning decisions and regulations,<sup>24</sup> but otherwise the people have to show they have an interest in the proceedings before they are able to access the court on environmental issues. Federally, under the *Environment Protection and Biodiversity Conservation Act 1999* the test for judicial review and enforcement is relatively open, allowing individuals and groups who have had ongoing involvement in an

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<sup>21</sup> 'Open standing' means that the right to bring proceedings is open to any person, and there is no need to establish a 'special interest' in the matter the subject of the litigation.

<sup>22</sup> See, eg, *Environment Planning and Assessment Act 1979* (NSW) s 123; *Protection of the Environment Operations Act 1999* (NSW) ss 252 and 253; *Water Act 2000* (Qld) s 784 and *Environmental Protection Act 1994* (Qld) s 505.

<sup>23</sup> Under section 82 of the *Planning and Environment Act 1987* (Vic), any person who lodged an objection to the grant of a planning permit can apply to VCAT for merits review of a decision.

<sup>24</sup> See *Planning and Environment Act 1987* (Vic) ss 82 and 114.

environmental issue to bring proceedings.<sup>25</sup> Unfortunately, in terms of access to justice, the right to merits review of decisions by the Federal Environment Minister was removed in 2006.

In the event that the relevant environmental legislation does not provide for open or extended standing, groups or individuals that want to seek judicial review of a decision concerning the environment, or enforce a breach of an environmental law, must take proceedings in their respective state Supreme Courts. To be able to take such proceedings, they need to satisfy the common law test for standing. The leading High Court case on the question of standing in the context of enforcement of environmental laws is *Australian Conservation Foundation Incorporated v The Commonwealth of Australia*.<sup>26</sup> In this case, the Court found that a ‘special interest’ was required before a party could be said to have standing to bring proceedings. In explaining what ‘special interest’ meant, Gibbs CJ stated:

A person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails. A belief, however strongly felt, that the law generally, or a particular law, should be observed, or that conduct of a particular kind should be prevented, does not suffice to give its possessor locus standi.<sup>27</sup>

This line of authority has been developed by the case law since, including the judgment in *North Coast Environment Council Inc v Minister for Resources*<sup>28</sup> and *Environment East Gippsland Inc v VicForests*.<sup>29</sup> Both these cases have expanded upon what ‘special interest’ means in the context of members of the public taking proceedings to uphold environmental laws, and have arguably interpreted the test applied in the *Australian Conservation Foundation* case broadly. As a result of cases such as *North Coast Environment Council* and *Environment East Gippsland* public interest groups who can show an ongoing involvement in an issue and some sort of government recognition that the group rightfully speaks for a certain sector of the community — a sector concerned about a particular environment — will generally be granted standing in cases involving public interest environmental law matters.

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<sup>25</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 475.

<sup>26</sup> (1980) 146 CLR 493.

<sup>27</sup> *Ibid* [20].

<sup>28</sup> (1994) 55 FCR 492.

<sup>29</sup> [2010] VSC 335.

Nevertheless, the common law test for standing would potentially exclude a considerable number of members of the public, who are concerned about the environment, from gaining access to environmental justice in instances where it appears that environmental laws have been breached.<sup>30</sup>

Ensuring procedural justice, ensuring that laws allow for proper participation in decision-making and access to information, is an essential first step in providing access to environmental justice. Procedural justice is relatively easy to attain: all that is required is amendments to relevant legislation. Across Australia, there are several good examples of laws that facilitate procedural access to justice, including some of those referred to above.

However, procedural justice alone does not provide access to environmental justice. A variety of other barriers to the participation of the public in executive and governmental decisions and in access to the courts exist. The significance of these barriers is demonstrated by the failure of ‘floods’ of litigation — or in some instances much litigation at all — to eventuate in jurisdictions that have open standing provisions.<sup>31</sup>

## V SUBSTANTIVE ACCESS TO JUSTICE

The term ‘substantive justice’ refers to the other factors that are required, in addition to procedural justice, to enable people to participate in decision-making. Having good laws that facilitate consultation and having broad standing provisions will not alone ensure that members of the public will have access to environmental justice.<sup>32</sup> Appropriate institutions and the education of members of the public, as well as changes to the current way the legal system operates, are also required.

The first step in ensuring access to environmental justice is to ensure that the public is aware of its rights and opportunities to participate in government decisions and know how to utilise these opportunities. The public must be able to participate in the justice system in the event that a decision that will potentially impact on the environment is about to be made, or in the event that

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<sup>30</sup> The Hon Justice Peter McClellan, ‘Access to Justice in Environmental Law — An Australian Perspective’ (Paper presented at Commonwealth Law Conference, London, 11–15 September 2005).

<sup>31</sup> Ibid.

<sup>32</sup> Jeff Smith, ‘The Changing Nature of Public Interest Environmental Law’ (Paper presented at the Enterprise Sustainability Conference, Sydney, 2 June 2004) <<http://www.edo.org.au/edonsw/site/pdf/presentations/publicpartic.pdf>>.

an operation or development is not complying with environmental laws. Government, tribunals and courts make some attempt to do this by providing information and education services. Non-government organisations also educate people about their rights and opportunities to participate in decision-making and enforcement. For example, the Environmental Defender's Office (Victoria) (EDO) runs workshops in the community on a variety of environmental law matters. These workshops are designed to make the laws understandable and educate the public on opportunities for participation. In addition, the EDO has published free Kits designed to assist unrepresented members of the public to present their case before the Victorian Civil and Administrative Appeals Tribunal (VCAT) in planning and environment matters.<sup>33</sup>

Even if people are educated and aware of how they may access tribunals and other decision making fora, doing this in practice can be difficult. Courts and tribunals can be intimidating, and gaining an understanding of their procedures may be difficult. Some tribunals make an attempt to be less formal and more accessible. For example, in VCAT, hearings that involve merits review in planning and environment matters take place around a round table and parties do not stand when speaking. VCAT also produces a series of materials such as videos on its website, to explain the procedure to the public.<sup>34</sup> On the other hand, Supreme and Federal Courts are necessarily legalistic and present procedural difficulties for lawyers who do not frequently practise in those jurisdictions, let alone members of the public who have had no exposure to the court system before.

This means that taking judicial review proceedings or enforcement proceedings is not usually possible for community groups unless they can get legal representation. The EDO was established to try to overcome some of these barriers by providing free or reduced-rate assistance to people attempting to access decision-making processes relevant to environmental law.<sup>35</sup>

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<sup>33</sup> Environmental Defender's Office (Victoria), *Publications*, EDO Ltd (Victoria) <<http://www.edo.org.au/edovic/publications.html#Kits>>.

<sup>34</sup> Victorian Civil and Administrative Tribunal, *Video Guides* (14 June 2010) VCAT <<http://www.vcat.vic.gov.au/CA256DBB0022825D/page/Video+guides?OpenDocument&l=12-Video+guides~&2=~&3=~>>.

<sup>35</sup> Maria Comino, 'Improving Access to Justice for Environment' (1996) 13 *Environmental and Planning Law Journal* 225; Jeff Smith, 'The Changing Nature of Public Interest Environmental Law', (Paper presented at Enterprise Sustainability Conference, Sydney, 2 June 2004) <<http://www.edo.org.au/edonsw/site/pdf/presentations/publicpartic.pdf>>.

Furthermore, there is almost always a significant resource-imbalance between developers and government on the one hand, and members of the community trying to participate in decision-making processes on the other.<sup>36</sup> This is the case even if community members are able to engage a solicitor. The nature of environmental law means that technical matters often arise, which can be understood only with the assistance of expert opinion.

Experts can be very expensive. In addition, finding experts willing to do work that may involve them giving evidence against large developers, mining companies, operators of industrial facilities and government bodies can be very difficult, because experts do not want to prejudice future opportunities for obtaining work from these companies and entities. For example, on several occasions, the EDO has found it near impossible to find an expert willing to give evidence against a mining company in relation to the impact of longwall mining. In one instance, it was so difficult that in the end the client retained an expert from the USA. Obviously, this is usually not a feasible option for community groups. (It should also be noted that it was cheaper to fly the expert to Australia than pay the court fees for using video link-up to have him give his evidence remotely.)

In addition to the costs of experts and lawyers, the threat of adverse costs orders is a significant barrier to accessing justice. The usual rule as to costs — that costs follow the event — can act as a huge deterrent to members of the community trying to take legal action to protect the environment or trying to have input into a decision about a development.<sup>37</sup> In some jurisdictions, the rules of the court provide protections against costs orders in environmental matters, either by providing legislative protection against adverse costs orders for public interest matters or by having a general rule that each party pay its own costs.<sup>38</sup> In addition, developments in the common law have also ameliorated the impact of the usual costs order in instances where matters have been brought in the public interest to protect the environment. Examples include recognition that the courts' discretion on costs allows the courts to make no order as to costs<sup>39</sup> and to make an upfront protective costs order.<sup>40</sup> This type of order caps the costs in the proceedings at a set amount at the outset of the proceedings to limit parties' liabilities and has been used in some public interest environmental matters. However, rules as to costs need

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<sup>36</sup> Ibid 225.

<sup>37</sup> McClellan, above n 30; Smith, above n 32.

<sup>38</sup> *Judicial Review Act 1991* (Qld) s 49 and *Victorian Civil and Administrative Tribunals Act 1998* (Vic) s 109.

<sup>39</sup> *Oshlack v Richmond River Council* (1998) 193 CLR 72.

<sup>40</sup> *Delta Electricity v Blue Mountains Conservation Society Inc* [2010] NSWCA 263.

significant reform if gains in access to environmental justice are to be achieved.

There are also geographical barriers to access to environmental justice. People in rural and remote communities are often a significant distance from where decisions are made. Rural councils frequently cover large areas, which could mean that attending a council meeting may require a drive of several hours. Most courts and tribunals that make decisions on environmental law matters are based in the capital cities of each state. Authorities or decision-makers themselves may also be distant from where impacts are occurring, or where the decision will have impacts, and do not have a good understanding of the local issues and environment. Access and choice in relation to lawyers and experts, and the costs of obtaining these services, can also be impacted upon by geography.

This is something I have witnessed first-hand working at the EDO. Since the EDO is based in Melbourne, our clients in the metropolitan area have much better access to our workshops and seminars, and are more easily able to meet and discuss their cases, than those in rural areas. Whilst modern technology overcomes these barriers to a large extent, typically our rural and remote clients have to put in more hours to access justice.

Obviously, providing substantive justice to citizens requires a lot more than law reform alone. It requires provision of resources to educate communities about their rights and how to utilise them, and to educate law makers and decision makers about how to engage with the community. It may also involve the relocation of existing services or the provision of extra services and facilities in rural and regional areas, and increased funding to ensure affordable legal services.

### **A      *Case Study: Environmental Justice in the Context of Climate Change***

The impacts of anthropogenic climate change will be likely to affect everyone in some respects, but the more severe impacts will be unevenly distributed. Further, they will be likely to be geographically remote from the contributors to climate change, so that those who are responsible for contributing to climate change will be unlikely to bear the brunt of the impacts. For these reasons, climate change and its impacts will pose challenges for environmental justice, making it even harder to achieve. At the same time, the fact that those who suffer the worst impacts of climate change will more than likely not have significantly contributed to it means that access to

environmental justice will become even more important from a social justice perspective.

Several of the predicted impacts of climate change will affect rural and regional communities more significantly than urban communities. Increased bushfire risk, sea level rise, drought and water insecurity and shortages are all likely to affect rural and remote communities more significantly. For example, the Intergovernmental Panel on Climate Change (IPCC), in its latest report, has stated that 'water security and coastal communities' are the sectors in Australia that are most vulnerable to the impacts of climate change.<sup>41</sup> In Victoria, areas most vulnerable to threats of water shortages and sea level rise are rural or regional areas. Particular areas on Victoria's coast outside metropolitan areas are expected to experience sea level rises in excess of 2 metres by as early as 2030.<sup>42</sup> In addition to environmental impacts, social and economic impacts are also expected, many of which will affect regional and rural areas disproportionately. For example, increased drought and fire are predicted to lead to a reduction in forestry, and decreased rainfall and increased climate variability are expected to lead to a reduction in agricultural productivity in southern and eastern Australia.<sup>43</sup> The IPCC further predicts that indigenous communities will be particularly vulnerable to the impacts of climate change because of their low adaptive capacity.<sup>44</sup>

Issues concerning adaptation to climate change are starting to be addressed through environmental and planning policies and laws. Some of these policies and laws have the potential to have significant human and environmental costs and impacts. The area of coastal development and management, is a good example of an area where many decisions and policies that need to be implemented to minimise the impacts of climate change (in this case sea level rise) will cause disadvantage and difficulty. Policy in relation to where development can occur may impact upon the public accessibility of local beaches<sup>45</sup> and whether or not a person can develop their land.<sup>46</sup> Failure by

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<sup>41</sup> Kevin Hennessy et al, 'Chapter 11: Australia and New Zealand' in M L Parry et al (eds), *Climate Change 2007: Impacts, Adaptation and Vulnerability: Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change, 2007* (Cambridge University Press, 2007) 509.

<sup>42</sup> Kathleen McInnes, Ian Macadam and Julian O'Grady, 'The Effects of Climate Change on Extreme Sea Levels along Victoria's Coast' (Report for the Future Coasts Program, Victorian Government, Department of Sustainability and Environment, CSIRO, November 2009).

<sup>43</sup> Hennessy et al, above n 41.

<sup>44</sup> Ibid.

<sup>45</sup> See, eg, *Byron Shire Council v Vaughan, Vaughan v Byron Shire Council* [2009] NSWLEC 88, which involved a dispute between Council and a landholder, in relation to the landholder placing rocks and barriers to protect his beach front property and front yard from erosion

state and local government to prepare and implement sensible coastal policy in a timely way could lead to inappropriate development in vulnerable coastal areas that may lead to communities experiencing flood damage in future, or to homes being washed into the sea.

Another reason why access to environmental justice in the context of climate change is important is that some levels of government and government agencies are lagging behind the science and failing to adequately address climate change and the need to take adaptive measures in their decisions. As a result, people have needed to challenge decisions in courts on the basis that the government failed to consider climate change and its impacts.<sup>47</sup> It is likely that similar challenges will continue to occur until such time as government planning and policy properly address the risks posed by climate change.

With the environmental impacts of industry and development likely to become more serious as a result of climate change, there is a need to ensure that decisions that do not properly take into account climate change are challenged and that operations not complying with restrictions designed to minimise and reduce their impacts are able to be enforced, even where regulatory agencies fail to act. Probably more importantly, communities need to have an understanding of the potential impact of developments that will contribute to climate change, and how these developments can be adapted to, and their effects made less serious. Furthermore, communities need to know how decisions are made and how the communities can engage with and influence the decision-making process to ensure that their circumstances and concerns are addressed. If this cannot occur, it will have real and disproportionate impacts on the poorest and least resourced communities. This will be a major social justice issue.

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exacerbated by storm surges. The works by the landholder were likely to cause degradation to the beach and loss of public access to the beach.

<sup>46</sup> For example, in the matter of *Gippsland Coastal Board v South Gippsland SC* (No 2) [2008] VCAT 1545 (29 July 2008) VCAT refused the grant of planning permits for residential dwellings on 6 blocks of land, on land that was subject to inundation which was predicted to worsen as a result of sea level rise caused by climate change. In that case, VCAT stated that ‘The difficulty is that by refusing these permits, the plans of individual owners and their economic stake in the land are adversely affected’ and that not allowing the development ‘may seem harsh’.

<sup>47</sup> For example, *Walker v Minister for Planning* [2007] NSWLEC 741; *Gippsland Coastal Board v South Gippsland SC* (No 2) (Red Dot) [2008] VCAT 1545; *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment & Heritage* [2006] FCA 736.



Access to enforcement and recompense through the justice system will also be likely to become an important aspect of access to environmental justice in the context of climate change. As stated above, people who suffer the impacts of climate change are unlikely to have significantly contributed towards the problem. Notions of environmental justice require that these people somehow be able to take legal action and receive redress if contributions to climate change have been in breach of the law, and that they get recompense for damage to their land and lifestyles. This could see landholders in areas of regional Victoria that will experience sea level rises of up to 2 metres in the next 20 years seeking compensation from either negligent decision-makers who permitted building in such vulnerable areas or potentially from those who caused climate change, being significant emitters of greenhouse gases.

The importance and the difficulty of obtaining environmental justice, in this case rights to recompense, can be seen using the example of remote, island, indigenous communities. Torres Strait Islanders depend on marine and aquatic environments for food sources. The environment is also a huge component of traditional lifestyles and culture. Climate change is likely to cause significant changes to the Torres Strait environment, such as coral bleaching, and changes in the location and abundance of local plants and animals such as mangroves and dugongs.<sup>48</sup> In addition, because parts of the islands are low-lying, already the Islanders are experiencing climate change impacts such as increased inundation of important cultural sites such as graveyards.<sup>49</sup> In short, Torres Strait Islanders' way of life may be changed or destroyed by climate change impacts, which they did not cause. If environmental justice is to be in any way meaningful in this context, they will require compensation for their loss. However, the contributors to climate change are geographically remote, and potentially in different jurisdictions, and Aboriginal people and people in remote locations already face challenges in accessing the justice system. In these circumstances, it is uncertain whether obtaining environmental justice is even possible.

## VI CONCLUSION

Environmental justice requires that people be able to participate in decisions that create environmental risk or that will have environmental impacts on communities. It requires that they be able to seek enforcement of environmental laws or recompense for breaches of those laws and for damage

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<sup>48</sup> Donna Green and Kirsty Ruddock, 'Climate Change Impacts in the Torres Strait, Australia' (2008) 7(8) *Indigenous Law Bulletin* 2.

<sup>49</sup> *Ibid.*

caused to their environment. Reforms to the law and to ways of making decisions and sharing information need to be made in order that access to environmental justice becomes possible for all members of the public who are affected by and want to participate in environmental decision-making. This applies especially to those who traditionally have not been involved in environmental issues.

Some of the relevant reforms are listed below. Because of the broad-reaching and unevenly distributed impacts of climate change, and because of the indirect relationship between the contributors to climate change and those that will be most affected by it, these reforms are essential if access to environmental justice is to be achievable..

### ***Actions/Strategies***

The following strategies would go some way to improving access to environmental justice:

- Increased commitment by government to the funding of bodies that can educate people on how to access courts and tribunals and how to participate in those planning and policy decisions that will have environmental impacts or create environmental risk;
- Improved consultation by industry and government decision-makers about the impacts of development and environmental change;
- A statutory requirement that community concerns be given weight and, if possible, addressed in government decision-making;
- The passing of improved laws relating to access to government information, including Freedom of Information laws. The new Queensland and New South Wales laws could be a model for other jurisdictions;
- The passing of uniform, open standing laws across Australia allowing for the enforcement and judicial review of environmental laws;
- Increased funding at federal, state and local levels of government for the investigation and enforcement of environmental laws;
- The better resourcing of government agencies such as the EPA and water catchment authorities and their better education on how to make

information about the impacts of operations available to communities, so that those communities can be informed without needing to expend funds themselves on engaging experts;

- The better resourcing and education of government agencies such as the EPA and water catchment authorities so that they can plan and make decisions and regulations that take into account the need to adapt to the impacts of climate change, and so as to place them in a position to educate the community about climate change risks and impacts;
- The conducting of tribunal and court hearings relating to environmental matters in the areas where the development in issue will take place, or where the impacts of the decision will occur.