

By Felicity Millner and Tom Dreyfus

PROTECTING the ENVIRONMENT through LAW

The Environment Defenders Office Victoria Ltd



The EDO is an independent, not-for-profit, expert, public interest environmental law centre. It was established in Victoria in 1991 to provide environmental legal advice and assistance to conservation and environment groups and members of the wider Victorian community.

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The reason for founding the office was to redress the imbalance between public interest environmental litigants and their opponents, many of whom had – and continue to have – access to far greater financial resources. Over the past two decades, the EDO has sought to rectify this imbalance by enabling individuals or groups working in the public interest to participate in the management and protection of our natural and cultural environment.

In more recent years, the focus of the office has been to

uphold and improve the laws that protect the environment. The EDO continues to work towards a legal system that protects the environment, promotes its enhancement, and encourages public participation in decision-making on environmental issues.

OUR MISSION

The EDO's mission is to protect the environment through law. We do this by providing legal advice, information and representation in legal matters involving the natural >>

environment. The EDO provides its services to members of the community dealing with issues of public interest environmental law, especially those who are not able to effectively participate in the legal system through social or economic disadvantage or lack of access to legal assistance.

The EDO also aims to empower its grassroots clients by promoting and developing educational programs for the community in relation to environmental and planning law matters. These programs may take the form of training or more general support for community groups and environmental organisations engaged or interested in public interest environmental issues. In recent times, the EDO's work in this area has included conducting workshops, seminars and symposiums and preparing factsheets on issues ranging from the protection of Victoria's flora and fauna through biodiversity laws to monthly workshops for planning permit objectors involved in Victorian Civil and Administrative Tribunal (VCAT) appeals.

As part of its mission, the EDO also engages in law reform activities that are informed by its strategic priorities, by its clients, and by peak conservation groups such as the Victorian National Parks Association and Environment Victoria. These activities aim to ensure that existing environmental laws are implemented and applied, and to improve law so that it better protects the environment. In 2012, EDO law reform activities have included publishing a report on the concept of 'environmental justice' as a principle for identifying priority areas of unmet need in public interest environmental lawyering, as well as disadvantaged groups who bear a disproportionate share of environmental risk,¹ and submissions to parliamentary inquiries such as the Victorian Environmental Assessment Council's Marine investigation.²

EDO CASES

A central part of the EDO's work is conducting public interest litigation. The EDO has acted in a number of recent cases which have had a profound impact on Victoria's environmental and legal landscape.

Stopping the construction of inefficient, brown coal power stations

Since 2010, the EDO has been acting for two environmental non-government organisations, Environment Victoria and Locals Into Victoria's Environment Inc, in proceedings seeking to stop Dual Gas Pty Ltd (Dual Gas) from building a 600MWe power plant in Morwell in Gippsland, east of Melbourne. The proposed power plant was to burn 'syngas', created from the drying and gasification of brown coal, to drive a combined-cycle gas turbine and generate electricity.

Various environment groups, including the EDO's clients, objected to the power plant on the basis that the same amount of electricity could be generated using existing technology with much lower emissions, such as through the burning of natural gas. They argued that new brown coal fired power was inconsistent with the laws governing large emitters of greenhouse gas emissions, which required that developments should implement 'best practice' management

of emissions and be consistent with the principles of ecological sustainable development.

Nevertheless, in May 2011 the Environment Protection Authority (EPA) granted approval for the construction of a 300MWe power plant. Neither Dual Gas nor the objectors were satisfied with that outcome and review of the decision was sought in the VCAT.

The lengthy trial in the VCAT ultimately determined that Dual Gas could proceed with the construction of a 600MWe power plant in Morwell, subject to a condition preventing construction of the power station until such time as 600MWe of less efficient power generation closed down in Victoria under the federal government's 'contracts for closure' policy, under which the government offered payments to the least efficient power generators in the country to cease operating.³

In imposing the above condition, the VCAT recognised that a net increase in greenhouse gas emissions from power generation is inconsistent with the principles of ecological sustainable development – an important advancement in the application of Victorian environmental law.

In September this year, the federal government announced it was no longer proceeding with the 'contracts for closure' policy. This means it is unlikely the Dual Gas project will be able to proceed under the current works approval.

Police surveillance powers

In July 2012, the EDO represented Lisa Caripis, a writer and researcher on climate change law, in proceedings against the Victoria Police designed to test their powers to retain information on protestors. The case was heard over two days at the VCAT.

Ms Caripis attended a peaceful, incident-free, protest at Hazelwood Power Station, where she was filmed by police. Following the protest, Ms Caripis wrote to the police asking them to destroy any footage of her. The police refused. Ms Caripis has no police record and had never been arrested.

As a consequence, Ms Caripis sought orders under the *Information Privacy Act 2000* (Vic) (IP Act) requiring the Victoria Police to destroy – or be restrained from retaining – photographs and footage of Ms Caripis' attendance at a rally. Ms Caripis further sought a declaration from the VCAT that the Victoria Police had unlawfully retained her personal information contrary to its obligations under the Victorian *Charter of Human Rights and Responsibilities 2006* (Charter).

Under the IP Act, an act or practice can constitute an interference with the privacy of an individual if it is inconsistent with an Information Privacy Principle (IPP).⁴ In this case, Ms Caripis contended that the Victorian Police had breached three separate IPPs by collecting information unnecessary to its function; by collecting information in an unreasonably intrusive way; and by not taking reasonable steps to destroy or de-identify her personal information.

Ms Caripis also argued that her rights to privacy, peaceful assembly and freedom of expression, which are protected under the Charter, had been compromised by the Victoria Police. These matters were relevant because the IP Act must be interpreted in accordance with the Charter.⁵

The case received significant attention in the news media.

Although not strictly related to environmental law, the EDO acted for Ms Caripis because we believe that it is in the interest of the environment for members of the public to be able to freely participate in the public debate about climate change and other environmental issues without being made to feel like they have done something wrong, or have their privacy infringed.

The Tribunal handed down its decision in October this year, ultimately finding that the police's retention of the footage did not breach Ms Caripis' privacy or her human rights. The Tribunal accepted the police's evidence that the footage was needed for intelligence purposes, for the purposes of planning for future protests and to comply with the *Public Records Act 1973*, which requires the police to retain footage for a certain period of time. The decision provided clarity on the extent to which the IP Act protects privacy, an issue that had not previously been tested in the Tribunal.

EDO LAW REFORM WORK

The EDO has a dedicated law reform program that is funded by the Legal Services Board of Victoria, which pursues both proactive and retroactive policy and law reform work. EDO law reform work often relates to highly topical and politically contentious issues, with recent work on coal and coal seam gas mining, the Murray-Darling Basin Plan and the cutting of 'green tape' legislation pitting the EDO and

other environment organisations against federal and state governments and powerful industry lobby groups.

Coal and coal seam gas mining

Since early 2011, the EDO has received a large number of phonecalls from people in regional Victoria concerned about the prospect of coal or coal seam gas mining in their communities.

To address these concerns, the EDO has undertaken a campaign designed to empower rural communities. Elements of the campaign include conducting workshops in affected communities advising people of their legal rights against mining and how to use them, obtaining media coverage with key messages, including targeting the government's inaccurate claim that Victoria's mining laws incorporate 'stringent' environmental protections.

The EDO also engaged in targeted law reform, developing detailed analysis and recommendations for reform of Victoria's mining laws through submissions to parliamentary and departmental reviews and through a comprehensive report on mining law reform. The report, entitled *Reforming Mining Law in Victoria*,⁶ expounds the case for reforming Victorian mining law and recommends specific solutions.

Some of the key legal issues associated with coal and coal seam gas mining include:⁷

- The privileged treatment that the mining industry receives in relation to its operations on private land. Mining >>

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companies can explore for minerals on private land without having to buy the land from the landholder.⁸

- The exemption for minerals exploration and production activities from the need to obtain certain approvals under environment and planning laws. The exemptions in the *Minerals Resources (Sustainable Development) Act 1990* (Vic) (MRSD Act) provide that minerals exploration never requires a planning permit⁹ and minerals production can never be a 'prohibited use'.¹⁰
- The absence of a transparent and credible environmental impact assessment (EIA) regime. Minerals exploration and production proposals in Victoria do not currently undergo a process of credible EIA, leading to an improper understanding of the environmental impacts of mining in the state.
- Victoria's mining laws ignore the impact that new exploration and mining projects are likely to have on climate change. There is no clear legal requirement under the current regime to quantify the greenhouse impacts of mining, or to provide such information to the public.

The EDO proposed a number of solutions to these issues. Among others, these included recommendations that:¹¹

- The minister should undertake strategic planning and identify 'no-go zones' for mining, over areas such as prime agricultural land, land that provides 'indispensable ecosystem services'¹² and areas with important water resources, or where mining would have a clearly unacceptable impact on the environment or community.
- Explorations and mining projects should be subject to EIA and approval under new legislation to replace the *Environmental Effects Act 1978*.
- Proponents of mining licences must obtain EIA approval before they can be granted a licence.

Rights and remedies for affected landowners and community groups

The EDO also identified the need for more rights and respect in regional communities affected by mining whose members felt let down by Victoria's mining laws. During the preparation of the report, for example, it became apparent to the EDO that many members of regional communities were not even aware that mining was proposed on their land or in their community.

The EDO believes that no new approvals should be granted for coal or unconventional gas exploration or production in Victoria until more is known about the risks posed by these activities. By advocating for reform of Victoria's mining laws and by informing local communities of their legal rights, the EDO is working with others towards a safe and necessary moratorium on coal and coal seam gas mining in the state. This campaign has had some success, with the government recently announcing a moratorium on fracking, until national environmental guidelines regulating the process are developed.

The Murray-Darling Basin Plan (MDBP)

The environmental management of the Murray-Darling Basin continues to be a contentious and often divisive issue for state and Commonwealth governments, local stakeholders

COAG's response to the BCA's proposal to remove 'green tape' betrays an increasing emphasis on complying with business demands for deregulation at the cost of environmental protection.

and environment and conservation organisations. The Murray-Darling Basin is the catchment for the Murray and Darling rivers. It extends from north of Roma in Queensland to Goolwa in South Australia and includes three-quarters of New South Wales and half of Victoria. The Basin contains extensive wetlands, and provides water resources for about 1.3 million people. It is also home to about 30 Aboriginal nations whose rich cultural heritage depends on the Murray-Darling river systems.¹³

The EDO's activities in relation to the Basin have included advising peak environment groups on legal issues regarding the *Water Act 2007* (Cth), drafting submissions and conducting community workshops on the legal aspects of the three draft plans published to date, and assisting communities to engage in the consultation process.

Legal issues for the Murray Darling Basin Plan (MDBP)

In 2007, the Murray-Darling Basin states and the Commonwealth government agreed that the Commonwealth should have the power to regulate water in the Murray-Darling Basin. Subsequently, the Commonwealth government passed the *Water Act 2007* (Cth) (Water Act), with bipartisan support. The Water Act requires the creation of the MDBP and aims to return extraction in the Basin to sustainable levels for the long term, to support both the ecosystems that depend on the Basin and the continued productive use of the Basin.

Although it is called a 'Plan', the MDBP is a legislative instrument that is legally binding on Basin states, Commonwealth agencies and individuals. In November 2011, the Murray-Darling Basin Authority (MDBA) released a Draft Basin Plan¹⁴ and opened it for public comment. EDO Victoria took this opportunity to respond with a *Legal Analysis of the Proposed Murray-Darling Basin Plan*.¹⁵ The analysis identified key elements of the Plan that do not comply with the Water Act.

The EDO believes that the major legal issues concern the way the MDBA has made decisions regarding the environmentally sustainable level of take (ESLT) and the sustainable diversion limits. By placing socio-economic considerations above environmental concerns, the EDO considers that the current approach taken by the MDBA

may lead to future litigation that could destabilise the fragile coalition of stakeholders.

Protecting federal environmental laws

Sometimes our law reform work involves working to ‘hold the line’ and protect existing environmental laws in the face of attacks to these laws from business and government.

The inaugural meeting of the Business Advisory Forum (BAF) to the Council of Australian Governments (COAG), convened by the Prime Minister, was held on 13 April 2012. The stated purpose of the meeting was to ‘improve national productivity growth to boost the prosperity of all Australians’.¹⁶ Central to the agenda was the proposal by the Business Council of Australia (BCA) to remove ‘green tape’ for business – in particular, ‘identify and reduce regulations that may impose unnecessary costs on business, hindering competitiveness and stifling innovation’.¹⁷

The Communiqués released by COAG in response to the BCA proposal are of concern to the EDO and other environment organisations because they betray an increasing emphasis on complying with business demands for deregulation at the cost of environmental protection.

The EDO identified three parallel threats arising from COAG’s announcement:

- (1) a package of damaging legislative amendments to the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) due to be introduced to federal parliament;
- (2) rushed negotiation of EPBC Act bilateral approval agreements between federal and state governments, which will transfer important environmental approval functions from the federal environment minister to the states, by March 2013; and
- (3) parallel and equally damaging changes to state and territory laws, including amendments aimed at accelerating the approval of major development projects.

The EDO’s experience means it is uniquely qualified to understand the importance of these environment protection laws. The EDO is using its expertise to support a strategic campaign to build and demonstrate public and political support for effective environmental laws in order to prevent the passage of these amendments. Through an alliance with other environmental NGOs, the EDO seeks to establish an overarching public narrative that sets up a clear choice for the government: you can stand up for clean air, clean water, wildlife, wild places and communities or you can side with vested interests that are destroying our environment for short-term profit.

THE WAY FORWARD

The EDO has a proud history of using the law in the protection of Victoria’s natural environment. As threats to environmental laws continue to arise and environmental issues continue to become increasingly serious, the EDO will continue to have an important role into the future. ■

Notes: **1** EDO (Vic) Limited, *Environmental Justice Project: Final Report*, 2012, <<http://www.edovic.org.au/law-reform/enviromental-justice>> **2** EDO (Vic) Limited, *Submission in response to VEAC Marine Investigation*, 2012, <<http://www.edovic.org.au/law-reform/submissions-and-issues-papers/veac-marine-investigation>> **3** *Dual Gas Pty Ltd & Ors v Environment Protection Authority* [2012] VCAT 308 [352]. **4** IP Act, s14(3). An act or practice may also be an interference with the privacy of an individual if it is contrary to, or inconsistent with, an applicable Code of Practice. **5** Victorian *Charter of Human Rights and Responsibilities 2006*, s32. **6** EDO (Vic) Limited, *Reforming Mining Law in Victoria*, 2012, <<http://www.edovic.org.au/law-reform/submissions-and-issues-papers/mining>> **7** *Ibid.* **8** *Ibid.* **9** MRSD Act s43(3). **10** *Ibid.*, s42(6). **11** EDO (Vic) Limited, *Reforming Mining Law in Victoria*, 2012, pp28-31 <<http://www.edovic.org.au/law-reform/submissions-and-issues-papers/mining>> **12** *Ibid.*, p6. **13** Murray-Darling Basin Authority, ‘Managing the Murray-Darling’s Water Resources’, 2010 <<http://www.mdba.gov.au/services/publications/more-information?publicationid=68>> **14** Murray-Darling Basin Authority, Proposed Basin Plan 2011, <http://www.mdba.gov.au/draft-basin-plan/draft-basin-plan-for-consultation> **15** EDO (Vic) Limited, *Legal Analysis of the Proposed Murray-Darling Basin Plan*, 2012, <http://www.edovic.org.au/downloads/files/law_reform/EDO_legal_analysis_of_draft_MD_Basin_Plan.docx> **16** Council of Australian Governments, Business Advisory Forum, Canberra, 13 April 2012, *Communiqué*, p2, <<http://www.coag.gov.au/sites/default/files/2012-13-04.rtf>> **17** Business Council of Australia, *Discussion Paper for the COAG Business Advisory Forum*, April 2012, p5 <http://www.bca.com.au/DisplayFile.aspx?FileID=815>

Felicity Millner is the principal solicitor at the EDO;
PHONE (03) 8341 3100 **EMAIL** felicity.millner@edo.org.au

Tom Dreyfus is a law student and volunteer at the EDO.

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Mark is a professional engineer, a qualified ergonomist and has been an Australian Lawyers Alliance member for several years.



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