the trigger proposed was more than 500,000 t CO2–e in any 12 month period. The Australian Network of Environmental Defenders Office (ANEDO) has also recommended such a trigger based on 100,000 t CO2–e per annum for all greenhouse emissions (that is, including existing emitters and not merely new emitters).[24] Similarly, the Shadow Environment Minister, Anthony Albanese MP, proposed a greenhouse trigger for the EPBC Act in a private members bill, *Avoiding Dangerous Climate Change (Climate Change Trigger) Bill* 2005. The Bill proposed a new s 25AA of the Act to provide a trigger based on emissions of 500,000 t CO2–e and an additional threshold of establishing a "significant impact" on the environment.

The need for a greenhouse trigger in the EPBC Act and how it might be framed is an important topic deserving further consideration both by the Australian Government and in the professional literature. Further analysis in the professional literature might attempt to calculate the greenhouse emissions from projects that have been approved under the EPBC Act since its commencement.[25] A cursory glance at the list of referrals under the Act[26] indicates that many coal mines and petroleum projects have been approved. Few appear to have been assessed for greenhouse emissions.

Conclusion

This case shows the need for a specific greenhouse trigger in the EPBC Act. While the outcome indicates that there is no effective mechanism in the EPBC Act for regulating even large emissions of greenhouse gases at the present time, this is an issue that is likely to see further litigation and legislative action in the future. The Australian, State and Territory Governments accept that climate change is a pressing policy issue that requires a comprehensive and effective response. The current legal regime does not provide for effective regulation of even enormous emissions from projects such as coal mines. Clear gaps and deficiencies in regulatory systems tend to be filled over time and this gap is unlikely to be an exception.

Booth v Frippery Pty Ltd and Ors - successful appeal in fruitbat case

Readers may recall from the Spring 2005 Queensland NELR Update the case of *Booth v Frippery Pty Ltd and Ors*, the first public enforcement action under state wildlife protection laws, to stop electrocution of protected native bats by a lychee farmer. Despite the farmer's admissions of thousands of illegal bat killings, Judge Pack DCJ found that the defence in section 88(3) of the *Nature Conservation Act* 1992 had been made out.

Dr Carol Booth sought leave to appeal from that decision on 25 grounds, and the State environment department, the Environmental Protection Agency, joined as a party to the appeal in support of Dr Booth. On 17 March 2006 the Court of Appeal upheld Dr Booth's appeal and ordered a retrial of the case in the Planning and Environment Court. If the appeal had failed the *Nature Conservation Act* would have been rendered ineffective to protect wildlife.

TASMANIA

Gunns Ltd v Marr (No. 2) [2006] VSC 329 (28 August 2006) - Gunns' statement of claim Version 3 struck out: "... too much has been sought to be alleged against too many ..."

In *Gunns Ltd v Marr (No. 2)* [2006] VSC 329 (28 August 2006), Bongiorno J of the Supreme Court of Victoria rejected the Tasmanian timber company's third statement of claim against the Gunns 20 defendants. His Honour gave Gunns Ltd until 19 October 2006 to apply for leave to proceed, stating "... However, whatever they do they will need to radically alter the way they have pleaded this case to date."

24 ANEDO, "Possible new matters of national environmental significance under the EPBC Act" (ANEDO, Sydney, 2 May 2005), pp 22-28.

25 Building on the work of Fallding M, "Predicted Impacts on Energy and Greenhouse Gases in Hunter Valley Coal Mining Environmental Impact Statements" (1999) 6 AJEM 219.

26 See the public notice website at http://www.deh.gov.au/epbc/index.html (viewed 15 June 2006).

Justice Bongiorno held Version 3 of Gunns' statement of claim to be embarrassing [at para 23-24]:

> *"It is fundamental to the proper conduct of civil litigation that a defendant be apprised of the case he, she or it has to meet with precision and with such degree of specificity and clarity as will enable a case to be prepared on that defendant's behalf. The judgment of 18 July 2005 dealt with this very issue in some detail. Version 2 of the plaintiff's statement of claim was inadequate in that respect and was struck out. V3 is an improvement on V2 but it is still embarrassing as a statement of claim. This is at least partly because a fundamental problem with this litigation, which has been evident since the proceeding commenced, is that too much has been sought to be alleged against too many defendants in the one proceeding. This has led to a number of apparently insoluble problems, the first of which is that of embarrassment. At least if those problems are soluble, the plaintiffs to this proceeding have not solved them.*
>
> *The fact that a defendant has to grapple with a document as long as V3 with perhaps a further 2000 or so paragraphs of particulars, is, in itself, embarrassing. The search for the case made against a single individual is a daunting one for trained litigation lawyers. It would be extremely difficult ever to be completely certain that an important allegation had not been overlooked or that the case was understood as intended. An individual defendant is at an even greater disadvantage."*

Justice Bongiorno referred to various "... other obstacles in the way of justice posed by litigation such as this" [para 25]. His Honour also stated [at para 34], ".... whatever [the plaintiffs] do they will need to radically alter the way they have pleaded this case to date."

Justice Bongiorno struck out Version 3 of Gunns' statement of claim. His Honour ordered that the proceeding be stayed pending an ex parte application by Gunns for leave to proceed and gave Gunns until 19 October 2006 to make such an application. The question of the costs of the strike out application was stood over until 9 October 2006 [para 35-36].

Source: *Gunns Ltd v Marr (No. 2)* [2006] VSC 329 (28 August 2006) <http://www.austlii.edu.au/au/cases/vic/VSC/2006/329.html> and AAP, "Court blow for Gunns", *The Age*, August 28, 2006 <http://www.theage.com.au/news/national/court-blow-for-gunns/2006/08/28/1156617248396.html>

VICTORIA

Dennis Family Corporation v Casey City Council [2006] VCAT 2372 (23 November 2006) - Council responsible for infrastructure under development contribution plan

By Kim Piskuric, Solicitor, DLA Phillips Fox

The recent decision of the Victorian Civil and Administrative Tribunal (VCAT) in *Dennis Family Corporation v Casey City Council* [2006] VCAT 2372 (23 November 2006) provides a comprehensive overview of the evolution and operation of Development Contributions Plans (DCPs) and clearly establishes the principle that the responsibility for the provision of infrastructure identified in a DCP rests with the responsible authority. Significantly, in the context of this case, the Tribunal held that the City of Casey (Council) was responsible for the provision of infrastructure included in its DCP despite the fact that its DCP was significantly under funded.

Background

The matter came before the Tribunal on application from Dennis Family Corporation, made pursuant to section 149 of the *Planning and Environment Act 1987*, which sought review of Council's decision on the manner in which certain works were to be provided in order to satisfy conditions 26 and 27 of planning permit P130/04.

Permit P130/04 was issued for certain stages of the Hunt Club Estate, a residential and mixed use development of more than 1600 lots in Cranbourne East. Conditions 26 and 27 related to the 'provision' and construction of a section of Linsell Boulevard, a major east-west arterial road that had been partially constructed under a previous permit, and the construction of a major intersection. Both items of