such as the burning of coal mined by the applicants. This would also be consistent with the definition of 'impact' under the EPBC Act. FoE provided evidence from a number of leading scientists, including Dr Malte Meinshausen, Professor Ove Hoegh-Guldberg, and Professor Ian Lowe, who addressed the impact of the mine on climate change and ocean acidification.

The Court held that the phrase 'all adverse environmental impacts' was informed by the earlier phrase 'operations to be carried on under the authority of the proposed mining lease', and this was confined to the physical activities associated with extracting coal. The Court also distinguished the legislation in question from the EPBC Act.

The Court also determined that FoE was unable to point to any specific adverse environmental impacts caused by the scope 1, 2 and 3 emissions, but ultimately decided that, in light of the conclusions already made, it was unnecessary to decide whether it was necessary to demonstrate specific impacts.

Section 269(4)(k): The public right and interest prejudiced

The Court held that the issue of climate change was clearly a matter of general public interest and a matter which could militate against the grant of the proposed leases. However, it was only one of a number of matters that the Court must weigh up in considering whether the public right and interest would be prejudiced by the project. The Court also considered the economic impacts flowing from the project and decided that the economic impacts outweighed the 'comparatively minor' environmental impacts.

Section 269(4)(l): Any good reason has been shown for a refusal

The Court did not think that climate change was a good reason for refusal.

Findings in relation to the Environmental Protection Act

FoE contended that:

- the project would cause environmental harm
- the project was not in the public interest
- the project was not consistent with the objects of the EPA
- the project did not conform to the principles of ESD.

Under the EPA, the Land Court was required to consider:

- the application documents for the application
- any relevant regulatory requirement
- the standard criteria
- to the extent the application relates to mining activities in a wild river area—the wild river declaration for the area
- each current objection
- any suitability report obtained for the application
- the status of any application under the Mineral Resources Act for each relevant mining tenement.

The 'standard criteria' were defined in Sch 4, and included the *National Strategy for Ecologically Sustainable Development*. The EPA also required the Court to exercise its powers in a way that best protected Queensland's environment, and to consider the principles of ESD.

The Court held that its jurisdiction did not extend to a consideration of activities which did not fall within the scope of an EA. Because EA related to mining (i.e. extracting coal), the Court could not consider the broader issue of GHG emissions. The Court referred again to the economic benefits of the project, and stated that these would outweigh the 'comparatively minor' adverse environmental impacts.

Conclusion

The Land Court's findings in relation to the climate change issues were a disappointing outcome for the FoE. In particular, the Court's interpretation of the phrase 'all adverse environmental impacts' removed the need to analyse the scientific evidence provided by the extremely well-regarded team of experts assembled by FoE.

The time limit for appealing the Land Court's decision has passed, and it is understood that FoE did not lodge an appeal.

VICTORIA

Dual Gas Pty Ltd and Ors v Environment Protection Authority [2012] VCAT 308

by Barnaby McIlrath

Editor note: This summary has been adapted from a summary published by the tribunal. It is understood that Dual Gas has since decided not to pursue the project while there is uncertainty as to whether the condition imposed for retirement of 600MW under the contracts for closure could be complied with.

Dual Gas Pty Ltd sought permission to develop a 600MW power station in the Latrobe Valley that would generate base load power whilst demonstrating new power generation technology. The proposal involves the production of 'syngas' through the integrated drying and gasification of brown coal, which is then used in conjunction with natural gas to fire combined cycle gas turbines for power generation.

The generation of electricity is said to occur with a lower GHG emission intensity (GEI) than the burning of coal in a conventional coal-fired power station – for example, a 39% reduction in GEI compared with an average of the four largest emitting power stations in the Latrobe Valley. If successfully demonstrated at a commercial scale, the new technology was said to have worldwide application. Supporters of the Dual Gas project advocated it as 'part of the solution' to climate change, and as part of the transition to a cleaner energy future with less GHG emissions. Opponents of the project however saw the proposal as 'part of the problem', in still contributing to GHG emissions through the continued use of brown coal, and with a GEI still above that achievable from some other forms of electricity generation.

The EPA issued a works approval for a 300MW power station (i.e. half the capacity Dual Gas had sought). Four objectors, including Environment Victoria Inc., sought to review this decision, claiming that the emissions even from a 300MW project would be inconsistent with the State Environment Protection Policy (Air Quality Management). Dual Gas sought to review of the decision to restrict the capacity of the plant to 300MW.

Despite the wide range of issues, VCAT ruled that it had a limited discretion in its decision-making role. Section 33B(2) of the *Environment Protection Act 1970* (EP Act) provides only two relatively limited grounds for a person whose interests are affected to seek to review a works approval once it has issued. VCAT's jurisdiction in relation to a proponent's application to review conditions is also generally limited to a consideration only of those conditions related to the review.

The Tribunal noted that the task of considering whether the use of the works will lead to emissions that are inconsistent with the SEPP(AQM) is made harder because the SEPP contains provisions that are qualitative. The Tribunal noted that the Australian and Victorian governments have each changed their positions in recent times. The decision included a postscript arising from the Victorian government's release of its review of the *Climate Change Act 2010* (Vic) shortly before publication of the VCAT decision.

Dual Gas initially challenged the standing of all four objectors. The decision includes a detailed examination of the legislative framework and case law in relation to objector standing under s 33B(1) of the *Environment Protection Act 1970* (Vic). Given the wide definition to be given to 'a person whose interests are affected' under s 5 of the *VCAT Act*, the Tribunal found that three of the four objectors had standing, disagreeing with the narrower approach to standing adopted in *Linaker v Greater Geelong CC* [2011] VCAT 1806.

Within the limited remaining ground of review, the objectors collectively failed to establish that the use of the works that are the subject of the EPA works approval would result in emissions that would be inconsistent with the SEPP(AQM). Amongst other things, VCAT found:

- the Dual Gas project complies with the requirement for 'best practice' having regard to the definition of that term in the SEPP(AQM) and comparable industry activity. 'Best practice' does not require a comparison with all other type of electricity generation, such that the outcome would only ever favour the lowest greenhouse gas emitting form of generation
- the Dual Gas project is not inconsistent with a holistic assessment of the aims, principles or intent of the SEPP(AQM). In particular:
  - » the SEPP(AQM) supports Australian and Victorian measures to address the enhanced greenhouse effect. An objective assessment of relevant government policies and measures indicates a range of complementary measures. The Tribunal found that whilst there is a need to transition to a lower emissions energy sector, there are measures designed to maintain energy security as part of that transition, including the potential for the continued use of brown coal through emerging technologies such as that proposed in the Dual Gas project.
  - » the Dual Gas project has express support through the award of a conditional $100 million grant under the Australian government's *Low Emissions Technology Demonstration Fund*, and a $50 million grant under the Victorian government's *Energy Technology Innovation Strategy*.

» the Dual Gas project will not stifle opportunities for renewable energy to play a greater role in future energy supply.

» the Dual Gas project is not inconsistent with the principles of environmental protection in the SEP(AQM).

The decision discusses the application of the precautionary principle, the principle of intergenerational equity, and the integration of economic, social and environmental considerations (the integration principle). The decision also discusses the application of the decision-making requirements under s 14 of the *Climate Change Act 2010*.

VCAT allowed the application for review, but only in part, and has endorsed an increase in capacity of the Dual Gas project to 600 MW subject to conditions. Of particular note, the Tribunal imposed a condition requiring the retirement of an equivalent amount of conventional brown coal generation capacity under the Contracts for Closure program.

Amongst other things, VCAT found that:

- whilst the likelihood of the Dual Gas project being used in conjunction with future carbon capture and storage (CCS) is speculative, this is not a reason for not allowing the additional capacity. CCS capacity was seen as a potential benefit of the project. The Tribunal found that the unique gasification technology lends itself well to CCS and imposed a condition requiring that the project be CCS-ready;
- although opposed by Dual Gas, a condition requiring the works to be designed to operate at a greenhouse emissions intensity of 0.8 t CO_2-e/MWh should remain, with the GEI to be measured 'as generated'.

MyEnvironment Inc v VicForests [2012] VSC 91

Supreme Court rules against Toolangi

Editor note: This case note first appeared in Nick Croggon's blog on the EDO Victoria website: **www.edovic.org.au**)

The Supreme Court, in the case of ***MyEnvironment Inc v VicForests*** **[**2012] VSC 91 has found that the law did not protect an area of the endangered Leadbeater's possum habitat in Toolangi from logging by VicForests.

The case was launched in August 2011 by Central Highlands-based environment group MyEnvironment, who were represented by Bleyer Lawyers. MyEnvironment argued that the logging of three coupes in Toolangi was unlawful, because it was contrary to the environmental protection measures that applied to the site. MyEnvironment also argued that the logging would breach the precautionary principle. Both arguments hinged on the interpretation of laws that define protected habitat for the Leadbeater's possum, which is listed as threatened under State and Federal legislation, and was in 1960 believed to be extinct.

Following a reduction in the area planned for logging in one of the three coupes after the commencement of the case, the Court found that the remaining area planned for logging in that coupe did not include protected habitat for the Leadbeater's possum, as it was defined in the environmental protections that applied to the coupe. The Court also held that VicForests' plans to log the other 2 coupes were not yet detailed enough to rule that logging would necessarily be unlawful in those further coupes, and that the proposed logging did not breach the precautionary principle.

However, Osborn JA (who delivered the 2010 decision on logging in Brown Mountain) also said that the evidence showed an urgent need to review the applicable environmental protections, particularly in light of the impact of the 2009 bushfires (which destroyed around 45% of the possum's habitat).

This disappointing decision demonstrates a failure of the law – a failure of Victoria's environmental controls, and the Department that is responsible for them, to adequately protect the species they were enacted to protect. We should however be very thankful that groups like MyEnvironment have the courage to bring such legal proceedings. One of the gravest problems with our environmental laws is that battles to save protected species, and clarify our environmental laws, must be fought in the Supreme Court, with the huge accompanying costs and risks. While the results might be disappointing, the willingness of MyEnvironment to bear these costs and risks on the environment's behalf should give us some hope!