

Submission

to the

Inquiry into Greenfields Mineral Exploration and Project Development in Victoria

prepared by

Environment Defenders Office (Victoria) Ltd

2 September 2011

About the Environment Defenders Office (Victoria) Ltd

The Environment Defenders Office (Victoria) Ltd (**EDO**) is a Community Legal Centre specialising in public interest environmental law. Our mission is to support, empower and advocate for individuals and groups in Victoria who want to use the law and legal system to protect the environment. We are dedicated to a community that values and protects a healthy environment and support this vision through the provision of information, advocacy and advice. In addition to Victorian-based activities, the EDO is a member of a national network of EDOs working to protect Australia's environment through environmental law.

For further information on this submission, please contact:

Michael Power, Law Reform Lawyer, Environment Defenders Office (Victoria) Ltd

T: (03) 8341 3100

E: michael.power@edo.org.au

Submitted to:

edic@parliament.vic.gov.au

Executive Officer
Economic Development and Infrastructure Committee
Parliament House, Spring Street
EAST MELBOURNE VIC 3002

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SUMMARY OF RECOMMENDATIONS

The EDO recommends:

A moratorium on new coal and coal-seam gas

- A moratorium must be imposed on new coal and coal-seam gas mining projects until proper studies as to the sustainability of these industries in Victoria have been completed.

Strategic planning to balance competing land uses

- A strategic planning process should be established to identify and map out competing land uses in a sustainable way, based on independent, expert advice.
- The process must identify absolute minimum requirements (for example, for prime agricultural land, and high value environmental assets) and implement them through land use controls (including 'no go' zones).

Better protections for the environment

- Mining must be prohibited in identified 'no go' zones.
- Mining proposals may only be approved if it is ecologically sustainable (taking into account cumulative impacts) and consistent with the precautionary principle to do so.
- This will eventually require an overhaul of Victoria's out-dated environment impact assessment laws, to create a single integrated environmental impact assessment and approval system for projects (including mining projects).
- In the meantime, the *Mineral Resources (Sustainable Development) Act 1990* (Vic) must be amended to provide that an exploration or mining licence may only be granted if it is environmentally sustainable to do so, considering cumulative environmental impacts, and consistent with the precautionary principle.
- The decision whether or not to approve a licence should also be included in Schedule 1 of the *Climate Change Act 2010* (Vic) to ensure that the impact on climate change is taken into account.

Respect for the rights of communities

- Every owner or occupier of land that may be affected by an exploration or mining licence application must be directly notified of that application (personally, where practical). All licence applications must be made readily available and easily accessible on the Department of Primary Industries (**DPI**) website.
- Persons who objected to the grant of an exploration or mining licence should have the right to appeal that decision in the Victorian Civil and Administrative Tribunal (**VCAT**).
- The consent of a landowner to miners entering their land must in every case be written, and include conditions to ensure their consent is informed and free from undue influence.
- Any person should be able to bring an action to enforce a breach of the *Mineral Resources (Sustainable Development) Act 1990* (Vic) (**MRSDA**).

INTRODUCTION

EDO welcomes the opportunity to make a submission to this Inquiry. The manner in which greenfields mineral exploration and development in Victoria is conducted and regulated is a matter of great importance not just for the minerals industry, but for the community at large.

It is of particular interest to many of our clients. For the past 20 years EDO has been providing free or low-cost legal advice and representation to members of the public who seek to protect the environment in the public interest. As part of a national network of EDOs, our counterparts in other States and Territories do the same. Many of those clients are seeking assistance in matters involving mining law. This is especially the case with coal and coal-seam gas mining, especially in QLD and NSW.

Our submission deals with mining regulation as a whole, but with a focus on coal and coal-seam gas mining, since these are of most interest to our clients. We will only address two parts of the terms of reference:

- the regulatory environment; and
- the economic, social and environmental costs and benefits of greenfields mineral exploration and development.

We are very happy to provide the Inquiry with further information on our submission, or appear at a public hearing, if requested.

COSTS AND BENEFITS

Greenfields mineral exploration and development — particularly for coal and coal-seam gas — carries significant environmental, economic and social costs. Whilst the EDO is an organisation of legal and policy experts, not scientific or economic experts, we outline these costs here to explain and inform our suggested regulatory response.

Environmental costs

Mining projects often impose a significant strain on water resources. This is due to the very large amounts of water required for mining operations, and the impact on groundwater flows caused by movement in the ground's surface caused by the mines themselves.¹ They can also threaten water quality, due to the increased levels of suspended solids, heavy metals and (in some cases) toxic chemicals contained in water released from mines.² These impacts on water resources and quality are especially pronounced in the case of coal-seam gas mining projects, leading the National Water Commission to declare that coal-seam gas development "represents a substantial risk to sustainable water management."³

Mining projects can have a significant impact on biodiversity. They often require the clearing of native vegetation, sometimes on a large scale, leading to the loss of native flora and native fauna

¹ Environmental Defender's Office NSW, *Mining Law in New South Wales Discussion Paper* (2011) (**EDO NSW Discussion Paper**) pp 13-14.

² EDO NSW Discussion Paper pp 13, 18-19.

³ National Water Commission, *Coal Seam Gas and Water Position Statement* (2010).

habitat.⁴ The hydrological impacts of mining projects can also undermine upstream and downstream ecosystems, and the ecosystem services they provide.

Coal and coal-seam gas mining projects cause climate change. Australia has the highest per capita greenhouse gas emissions of any OECD country, and fossil fuel mining is a significant part of those emissions.⁵ The fugitive emissions released during mining, and the emissions caused by the burning of coal and coal-seam gas (in Australia or overseas), make a sizeable contribution to the already precarious state of the global climate. As climate change worsens, the burden on Australia's water resources and biodiversity will continue to grow.⁶

Social and economic costs

Mining projects pose a threat to food production, by competing for its two most important resources — water, and prime agricultural land. The impact of mining projects (especially coal-seam gas projects) on water resources as outlined above will impose an increasingly great strain on food production, as water resources become scarcer in times of increasing drought.⁷ The increasing demand for food in Victoria and abroad will demand increasing amounts of prime agricultural land, making that resource ever scarcer.

The environmental impacts of mining carry costs for the rural economy. The degradation of our natural resources — especially water — poses a direct threat to agricultural productivity. The presence of larger mining projects and the environmental degradation they involve undermines local amenity, and puts pressure on tourism. They also threaten local property values — particularly those properties which have exploration or mining licences over them.

By contributing to climate change, coal mining and coal-seam gas extraction fuel the economic consequences that climate change will bring. As recognised by the Stern Review and the Garnaut Review, climate change will impose a significant economic burden through increased natural disasters (like floods and bushfires, which Victoria knows too well), dwindling water resources, and strained food production capacity.⁸ However economically attractive coal and coal-seam gas mining may seem in the short-term, continued reliance on these high emitting energy sources carries significant long-term costs for Victoria's economy.

These environmental and economic costs have powerful social impacts. By placing more economic stress on regions who are already struggling to survive, they subvert the promise of prosperity and wellbeing for all Victorians. The degradation of the environment, reduced natural resources, a local economy squeezed by mining — all of these place a great burden on the happiness and wellbeing (not to mention mental health) of rural communities. This is in addition to the health impact of mining, caused by increased emissions of sulphur dioxide, dust and particulate matter — a health burden that falls disproportionately on rural communities. That social cost cannot be ignored — particular since the cost is disproportionately borne by rural communities, who already face many more challenges than other Victorians.

⁴ EDO NSW Discussion Paper pp 15-16.

⁵ Department of Climate Change and Energy Efficiency, *Australian National Greenhouse Accounts, National Greenhouse Gas Inventory 2008* (2010).

⁶ The Garnaut Climate Change Review, 'Climate change impacts on Australia', (2008) available here <http://www.garnautreview.org.au/chp6.htm>.

⁷ The Garnaut Climate Change Review, 'Climate change impacts on Australia', (2008) available here <http://www.garnautreview.org.au/chp6.htm>.

⁸ HM Treasury, *Stern Review on the Economics of Climate Change* (2006); The Garnaut Climate Change Review, 'Costing climate change and its avoidance' (2008) available here <http://www.garnautreview.org.au/chp6.htm>.

THE REGULATORY ENVIRONMENT

To avoid or minimise those economic, social and environmental costs, the regulatory framework for greenfields mineral exploration and development in Victoria must be reformed.

A moratorium on new coal and coal-seam gas projects

Coal mining and coal seam gas projects pose greater economic, social and environmental risks than other types of mining projects. The exact extent of those impacts is not yet known. The contribution to climate change, the threat to the water table, the bio-accumulation of toxic substances and the threat to food production all need further investigation before these industries can be declared 'safe'.

EDO therefore recommends that a moratorium be imposed on coal and coal seam gas development until those inquiries have been made, and a regulatory response has been finalised. Specifically, the Government should adopt a policy of not granting any new applications for exploration or mining licences (or retention or prospecting licences) for coal or coal-seam gas projects, until the recommendations outlined below (especially the strategic planning process) have been implemented.

Recommendation

- A moratorium must be imposed on new coal and coal-seam gas mining projects until proper studies as to the sustainability of these industries in Victoria have been completed.

Strategic planning to balance competing land uses

The competition between mining and other land uses, especially food production and environment conservation, is urgent and real. But at present, there is no considered response to managing this conflict, and balancing the various competing demands for land (especially prime agricultural land). A strategic planning process is required to deal with this. There needs to be a process to identify what we need in terms of food production, water use and mineral extraction, and map out what land, water and resources we have to meet that.

It won't be possible to map out exactly which land will be used for what. But it will be possible to identify some minimum requirements (for example for prime agricultural land and sensitive environmental assets like aquifers) and implement them through planning controls (including designated 'no go' zones closed to mining). It will also provide a valuable overview of Victoria's land use needs, allowing individual land-use questions to be approached in a more informed way.

This approach has several benefits. It provides greater certainty than a case-by-case, project-by-project assessment of whether or not development is permitted — which is good for business. It also offers a better way to avoid cumulative environmental impacts by taking a whole-of-environment approach — which is good for the environment. It allows stronger limits on land use to be set through 'no go' zones and reserves — giving communities the strong and non-discretionary protection they need.

It is critical, however, that the process is conducted properly. It must be treated as a way to guarantee protection for important environmental assets and other land uses that Victoria cannot do without. To be effective, the strategic assessment must be conducted by an independent body

with scientific, environmental and economic expertise. It must apply the precautionary principle in its assessment *and* recommendations. It must be transparent, open, and include ample scope for public participation. Its recommendations must be respected and implemented by the Government.

Recommendations

- A strategic planning process should be established to identify and map out competing land uses in a sustainable way based on independent, expert advice.
- The process must identify absolute minimum requirements (for example, for prime agricultural land, and other high value environmental assets) and implement them through land use controls (including 'no go' zones).

Better protection for the environment

Although the current regulatory framework for mining in Victoria gives some attention to ensuring that mining is conducted in an environmentally sustainable manner, it gives very little attention to the bigger question — whether a given mining project is environmentally sustainable *at all*. It is critical that this is redressed in the regulation of greenfields mineral exploration and development.

Problems with the current system

The problem with Victoria's assessment and approval regime is that it is fragmented into several stages. The initial approval — an exploration or mining licence (which grants rights to explore or mine minerals on that land) — does not take the environment or sustainability into account, though it does give the community some rights to object. The next two approvals — the work plan (which sets out how mining is conducted) and the planning approval (which sets out whether, and how, it is conducted) — *do* consider environmental factors. The fourth approval — the work authority (allowing actual work to commence) — requires the landowner's consent.

The problem with this fragmentation is that by the time the sustainability of the project is considered (at the third approval) or the landowner is asked to consent to the project (at the fourth approval) the mining project is already far progressed. The project has too much momentum to be halted or rejected based on environmental or community grounds, and the sustainability question is a foregone conclusion. This is especially because many of these approvals (importantly, planning approval) are only required for *mining*, by which stage *exploration* works (which involve a considerable amount of mining activity) would already be well underway.

Our proposal for a new system

An effective regulatory response must have two elements.

- **No mining in 'no go' zones.** If the strategic assessment has identified something as an absolute minimum requirement for a healthy environment and sustainable regional economy, then it makes sense that mining in that area be prohibited altogether.
- **Sustainability assessment for all other proposals.** Mining proposals in areas not covered by a 'no go' zone must be subject to an environmental impact assessment proportionate to the scale of their likely environmental impact. If the proposal is not sustainable, it must not be allowed to go ahead.

The best way to implement this would be through an integrated environmental assessment and approval regime applying to all major developments in Victoria. The EDO has long pushed for the *Environment Effects Act 1977* (Vic) and the *Planning and Environment Act 1978* (Vic) to be overhauled, to create a simple and effective environmental impact assessment and approval regime. We have made detailed submissions on what that system would look like, and will continue to do so.⁹ The sooner Victoria's EIA laws are brought into the 21st century, the easier these questions will become.

In the meantime, however, the best way to implement the two core requirements listed above is at the initial approval stage — the decision whether or not to grant an exploration or mining licence (or a retention or prospecting licence). The decision whether or not to approve a licence must be made according to whether it is environmentally sustainable to do so, considering cumulative environmental impacts, and consistent with the precautionary principle. The decision should also be included in Schedule 1 of the *Climate Change Act 2010* (Vic), so that the decision-maker must consider the impact of the proposal on climate change.

Recommendations

- Mining must be prohibited in identified 'no go' zones
- Mining proposals may only be approved if it is ecologically sustainable (taking into account cumulative impacts) and consistent with the precautionary principle to do so.
- This will eventually require an overhaul of Victoria's out-dated environment impact assessment laws, to create a single integrated environmental impact assessment and approval system for project (including mining projects).
- In the meantime, the *Mineral Resources (Sustainable Development) Act 1990* (Vic) must be amended to provide that a licence may only be granted if it is environmentally sustainable to do so, considering cumulative environmental impacts, and consistent with the precautionary principle.
- The decision whether or not to approve a licence should also be included in Schedule 1 of the *Climate Change Act 2010* (Vic) to ensure that the impact on climate change is taken into account.

Respect for the rights of communities

It is imperative that all Victorian mining operations consider the rights and concerns of the local community. Failure to do so will not only disempower those communities, but also generate considerable opposition to the project throughout its life.

⁹ See, eg, Environment Defenders Office, *Submission to the ENRC Inquiry into the Environment Effects Statement Process in Victoria* (2010)

http://www.edovic.org.au/law_reform/submissions_and_reports/submissions_and_issues_papers

Case study: Caroona, NSW

In a case in which EDO NSW was involved, in the Caroona region in North-western NSW, the community has reacted strongly to BHP being granted a coal exploration licence over a large area that includes some of Australia's most productive agricultural land. They were not consulted before the grant. The community are concerned about subsidence impacts on the prime agricultural land and groundwater impacts and were angered that these matters were not considered prior to the grant of the exploration licence. Once BHP began actively exploring, the local community (led by farmers concerned about the damage to their land and the environment) began a large campaign that included litigation, blockading BHP from access to landholders' properties, awareness raising and attempting to engage in political processes. As a result, the government has ordered a water study be completed before BHP are granted a mining licence. BHP's plans to mine have been significantly delayed as a consequence of the community's campaign.¹⁰

Case study: Darling Downs, QLD

In the Darling Downs in Southeast Queensland, a large rift between communities, farmers and miners has opened up, again as a result of the grant of mining licences without real consideration being given to the concerns of the community and environmental impacts beforehand, as well as the subsequent environmental impacts including groundwater contamination that has since occurred in the region as a result of mining activity. This issue remains one of the most significant political issues in Queensland at the moment.¹¹

The first step to respecting communities is to make sure that communities *know* about mining proposals that affect them. There are too many cases where a landowner does not know of an exploration or mining licence (or an application for one) which covers their land, and are shocked when they discover this at a later stage. The requirement that an applicant for a mining licence directly notify owners and occupiers of affected land should be extended to exploration licence applications. Where it is practical to do so, applicants should be required to visit affected landowners and inform them face-to-face. In addition, all current licence applications should be put on the Department of Primary Industries website in a central, up-to-date, easy-to-access place, to allow community members to keep abreast of current proposals.

Communities also need to be given real legal rights to oppose mining proposals that affect them. The best way to do this is to give communities the right to appeal a licence decision on the merits, along the same lines as the right that exists under the *Planning and Environment Act 1987* (Vic) (**PE Act**). In other words, any person who objects to an application for an exploration or mining licence should have the right to appeal the decision to the Victorian Civil and Administrative Tribunal (**VCAT**) on the merits. This is more than a welcome recognition of the rights of rural landowners — it is good public policy. Allowing merits review will improve the quality of decisions and ensure that they are based on policy, not politics. It will also allow the substantive dispute about whether or not mining should go ahead to be had all at once, before the mining project progresses too far — a better outcome for business *and* communities.

Once a licence has been granted, the rights of landholders whose land is covered by a mining licence must be strengthened further. There must be better safeguards to ensure that their

¹⁰ For more information, see the EDO NSW website:
http://www.edo.org.au/edonsw/site/casework_key_past.php#caroona.

¹¹ For more information, see Senate Environment, Communications and the Arts References Committee, *The impacts on mining on the Murray-Darling Basin* (2009) 6.

consent to miners entering onto their land is full and informed. The requirement to obtain written consent must include conditions to ensure that the landowner knows exactly what the mining operation is, that they have been offered independent advice, and that there has been no undue influence.¹² Specifically, the requirements for notices of an intention to explore or mine on a landowner's property should be prescribed in the Regulations and include the requirement that the notice be written, clearly describe the location and nature of the access they are seeking and informing the landowner that they can seek independent legal advice, at the expense of the licence holder, before signing the agreement. Further, the ability to obtain verbal (rather than written) consent for low impact exploration work should be repealed.¹³

Finally, communities should be given legal rights to ensure that existing mining laws are enforced. Any person should be able to bring an action to enforce a breach of the *Mineral Resources (Sustainable Development) Act 1990* (Vic). This gives the community a valuable role to play in ensuring that mining in their community is conducted according to the applicable legal requirements. It is also a very cheap way for the government to ensure that its laws are enforced.

Recommendation

- Every owner or occupier of land that may be affected by an exploration or mining licence application must be directly notified of that application (personally, where practical). All licence applications must be made readily available and easily accessible on the Department of Primary Industries (**DPI**) website.
- Persons who objected to the grant of an exploration or mining licence should have the right to appeal that decision in the Victorian Civil and Administrative Tribunal (**VCAT**).
- The consent of a landowner to miners entering their land must in every case be written, and include conditions to ensure their consent is informed and free from undue influence.
- Any person should be able to bring an action to enforce a breach of the *Mineral Resources (Sustainable Development) Act 1990* (Vic) (**MRSDA**).

¹² Clause 11 of the *Landholders' Right to Refuse (Coal Seam Gas) Bill 2011* (Cth) provides a useful example of such conditions.

¹³ *Mineral Resources (Sustainable Development) Act 1990* (Vic) s 43(1)(ea).