

# Discussion Paper

## Environmental Justice in Australia

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## **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.

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## Executive Summary

Over the past 30 years, an 'environmental justice' movement has developed in the United States of America. In comparison, the term environmental justice has been little used in Australia. The Environment Defenders Office is conducting a study to explore the applicability of environmental justice as a principle for informing good environmental law-making and decision-making in Victoria and Australia, and for identifying priority areas of unmet need in environmental justice communities.

Environmental justice has huge traction in the US, with a large number of states having some policy on environmental justice and several community and activists groups self-identifying specifically as 'environmental justice' organisations. Outside the US, the concept of environmental justice is applied in the context of international environmental law, and it also has some traction in the United Kingdom.

The concept of environmental justice started out as something quite narrow, but its application is much broader today, with a rapidly expanding application across a variety of disciplines and environmental themes. What it will mean in Australia is as yet unknown. Research on environmental justice specifically in Australian academia has been relatively sparse.

There is value in talking about environment justice in Australia because using the EJ framework to advocate for the interconnected ideas of environmentalism, social justice and human rights might help us think and talk about each of these issues more clearly and prominently. It may also present opportunities to partner with people and bodies that would not otherwise see themselves as concerned with environmental protection issues. In the absence of any enforceable civil or human rights framework or a strong political agenda for racial equality, EJ in Australia might gain most traction by linking itself to particular socioeconomic or geographic groups relevant to our society.

It is important that thought is given to how environmental justice and ecological justice might comfortably co-exist. There is a risk that the environmentalists might be uneasy with introducing 'human-centric' values to the environment dialogue.

Generally speaking, EDO does not provide services on a regular basis to clients that are representative of an ethnic minority, that are of Aboriginal or Torres Strait Islander descent or those who are otherwise socially or economically disadvantaged. EDO does not accept that because it does not regularly get approached by members of disadvantaged or marginalised communities, that these communities 'don't care' about the environment.

From its experience, EDO has identified three communities that are likely to be disadvantaged from an EJ perspective. EDO will explore these three cases studies to investigate the broad applicability of EJ in Australia: the Tullamarine toxic waste dump, Indigenous nations and their involvement in the formulation of the Murray-Darling Basin Plan, and those impacted by intensive animal industry in rural Victoria.

## Introduction

Many have noted that across the world, adverse environmental impacts fall disproportionately on the poorer nations and on particularly socially disadvantaged groups within nations or regions.<sup>1</sup>

Over the past 30 years, an 'environmental justice' (**EJ**) movement has developed, particularly in the United States of America (**US**), that studies, critiques and advocates for equality and fairness in the distribution of environmental harms and benefits, and for the rights of affected communities to participate in decision-making regarding these distributions.

In comparison, the term environmental justice has been little used in Australia and when it is used it tends to be in a fairly loose way that fails to appreciate the rich context of the US. There are signs, however, that the concept is starting to gain traction here. The Victorian Environmental Protection Authority (**Victorian EPA**) is currently considering how the concept might be developed and applied by it in a regulatory context.

This study will develop the concept of environmental justice and explore its applicability as a principle for informing good environmental law-making and decision-making in Victoria and Australia. It will explore the following questions:

- 1. Is the US definition of EJ applicable to Australia, or must we further explore the similarities and differences between Australia and the US?*
- 2. Should environmental justice relate to rights of individuals and/or should it be applicable to communities and cultural groups?*
- 3. What are the advantages of adopting EJ terminology and analysis in policy development in Australia?*
- 4. In general, is it true that disadvantaged and ethnic minority people are unrepresented in the environment movement in Australia as a whole? Further, is the concept of 'environment' as understood and used by environmental NGOs in Australia one that is generally defined by the white, educated, middle class?*
- 5. How can we reconcile a focus on environmental impacts on disadvantaged communities with overall good outcomes for the conservation of the biophysical environment? Is it foreseeable that in certain circumstances a good EJ outcome might infringe on ecological justice?*
- 6. What might be barriers to environment NGOs engaging with environmental justice principles?*
- 7. Will an EJ movement in Australia form as a new wave of environmentalism? Or might it evolve from another space, such as the social movement or the welfare sector?*
- 8. Would the formation of an Environmental Justice Network, similar to what exists in the UK, be beneficial for raising the profile of EJ in Australia and encouraging discourse and collaboration around EJ concepts?*

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<sup>1</sup> Crescy Cannan, 'The Environmental Crisis, Greens and Community Development' (2000) 35 *Community Development Journal* 365.

9. *In Australia, what role might lawyers play in an EJ movement? And to what extent should the concept be categorised as one of law?*

10. *To what extent do environmental injustices exist in Victoria? How can the principles of EJ be used to identify priority unmet needs and to develop appropriate and effective methods for meeting these needs?*

Three case studies will be undertaken to explore the broad applicability of EJ in Australia, comprising:

- community involvement in decision-making around the disposal of waste, particularly hazardous waste,
- traditional owner involvement in natural resource management, and
- rural disadvantage in access to information and services with respect to land use planning.

## Environmental justice – history and origins

To know what environmental justice is, and could be, we need to look at how it came about. In essence, 'Environmental Justice' is the name of the social movement that emerged in response to the particular problems faced by minority populations in the US in the early 1980s.<sup>2</sup>

It does not seem to be unanimous in EJ circles what precise event provoked the movement in the US.<sup>3</sup> Many authors and activists point to the protests in Warren County in North Carolina in 1982 as the first to draw significant media attention to the issue of 'environmental racism'.<sup>4</sup> The attention focussed on residents of the predominantly African American community who protested against the location of a toxic soil waste disposal facility in their county. It was 'what happens when people fear that their lives and health are being disproportionately put at risk because of the color of their skin or the sound of their accent'.<sup>5</sup>

Then, throughout the following decade, local communities continued to demand environmental equality and justice through grassroots activism. Many of the stories of these individual communities are told by Luke Cole and Sheila Foster in their 2001 book.<sup>6</sup> Parallel to this wave of activism, researchers set about documenting the unequal impacts of environmental pollution on different social classes.

An early study was by the US General Accounting Office in 1983, which found that in the cases of the four major landfills in the South of the US, all of the communities surrounding them were predominantly African American. This prompted a further study by the United Church of Christ Commission for Racial Justice to investigate whether this pattern in the South was part of a national trend. It was.<sup>7</sup> The 1987 report *Toxic Wastes and Race in the United States*<sup>8</sup> was the first significant body of work proving the correlation between the racial and socioeconomic communities and hazardous waste sites. The term 'environmental classism' was coined.<sup>9</sup>

What followed was the production of extensive literature on the issue, lead by Robert Bullard's book *Dumping in Dixie: Race, Class and Environmental Quality* in 1990.<sup>10</sup>

A wealth of EJ literature has demonstrated that many low-income populations ... live in neighborhoods that are differentially burdened by noxious land uses such as land-fills, hazardous waste sites, incinerators, publically owned treatment works ..., energy production facilities, petrochemical plants, and heavily trafficked roadways due to discriminatory and exclusionary zoning.<sup>11</sup>

The United States Environment Protection Agency (**US EPA**) evidently felt the pressure of the outcomes of these studies, and in 1990 set up an Office of Environmental Equity (later re-named the Office of Environmental Justice) and commissioned its own study in to the issue. In 1992 the US EPA's report

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<sup>2</sup> Mick Hillman, 'Environmental Justice: A Crucial Link between Environmentalism and Community Development?' (2002) 37 *Community Development Journal* 349.

<sup>3</sup> Note Martin Melosi's (1981) book *Garbage in the Cities* demonstrates that environmental inequality is not a contemporary problem, with ancient Rome, Green and Egypt locating their unwanted sewerage and waste in the quarters where the working poor and politically disempowered groups resided: David N Pellow, 'Environmental Inequality Formation: Toward a Theory of Environmental Injustice' (2000) 43 *American Behavioral Scientist* 581, 591.

<sup>4</sup> See Gordon Walker, 'Beyond Distribution and Proximity: Exploring the Multiple Spatialities of Environmental Justice' (2009) 41 *Antipode* 614; Paul Mohai, David Pellow and J Timmons Roberts, 'Environmental Justice' (2009) 34 *Annual Review of Environment and Resources* 405.

<sup>5</sup> Mohai, Pellow and Roberts, above n 4, 406.

<sup>6</sup> Luke W Cole and Shelia R Foster, *From the Ground up: Environmental Racism and the Rise of the Environmental Justice Movement* (New York University Press, 2001).

<sup>7</sup> Mohai, Pellow and Roberts, above n 4.

<sup>8</sup> Commission for Racial Justice, *Toxic Wastes and Race in the United States: A National Report on the Racial and Socio-Economic Characteristics of Communities with Hazardous Waste Sites* (United Church of Christ, Public Data Access Inc, 1987).

<sup>9</sup> Hillman, 'Environmental Justice', above n 2.

<sup>10</sup> Robert D Bullard, *Dumping in Dixie: Race, Class and Environmental Quality* (Westview Press, 1990).

<sup>11</sup> Sacoby Wilson, Malo Hutson and Mahasin Mujahid, 'How Planning and Zoning Contribute to Inequitable Development, Neighborhood Health and Environmental Injustice' (2008) 1 *Environmental Justice* 211, 213.

'Environmental Equity: Reducing Risks for All Communities'<sup>12</sup> detailed a number of recommendations to address environmental injustices. This was the first official acknowledgement by the federal government of the existence of these inequalities and the first step towards addressing them.<sup>13</sup>

Momentum continued to grow and in 1994, President Bill Clinton issued Executive Order 12898 calling on all agencies of the federal government to take environmental justice concerns into account in all rule making<sup>14</sup> and prohibiting discriminatory practices in programmes receiving federal funds.<sup>15</sup> This decision marks the apex of the EJ movement's influence, and it is this achievement which really sets apart the progress of the movement in the US compared the rest of the world. Contemplating a similar development in Australia highlights how far the concept of EJ could feasibly be progressed here and how much impact it could have on government decision-making.

By 2009, 41 US states had some policy on environmental justice and California had an environmental justice law.<sup>16</sup> By 2007, the US EPA's Office of Environmental Justice has distributed more than 800 grants to local groups aimed at increasing their capacities to achieve environmental justice in their communities.<sup>17</sup> What stands in the USA now is a 'de facto official policy and legal bar that environmental justice groups must reach to receive government attention'.<sup>18</sup> It is fascinating to think of a similar benchmark existing in Australia, and what this might mean.

Today, there are a huge number of community and activists groups in the US that self-identify specifically as 'environmental justice' organisations and work exclusively in this space. It has been described as 'one of the most active social movements in the United States today'.<sup>19</sup>

Outside the US, the term environmental justice is in use (especially in the international environmental law context), but in specific circumstances rather than to represent a broad movement as in the US. In particular, the dialogue around climate change acknowledges the 'common but differentiated responsibilities' of nations, where:

the developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.<sup>20</sup>

There are often environmental justice elements in these dialogues, but EJ is rarely referred to as a guiding principle. There have been other applications of EJ in countries other than the US, but again in quite narrow contexts<sup>21</sup> and often by US academics.

The United Kingdom is perhaps the exception to this,<sup>22</sup> and has various NGOs working in this space. The first protest action in the United Kingdom (**UK**) to use EJ language was in Greengairs in Scotland in 1998, in response to a plan to extend a cluster of landfill sites to accommodate toxic waste from a wealthy

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<sup>12</sup> United States Environmental Protection Agency ('US EPA'), 'Environmental Equity: Reducing Risk for All Communities' (Report, US EPA, June 1992).

<sup>13</sup> Mohai, Pellow and Roberts, above n 4, 410.

<sup>14</sup> *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, Executive Order No 12898, 59 Fed Reg 7629 (11 February 1994)

<sup>15</sup> Julian Agyeman, 'Constructing Environmental (in)Justice: Transatlantic Tales' (2002) 11(3) *Environmental Politics* 31

<sup>16</sup> Mohai, Pellow and Roberts, above n 4, 422.

<sup>17</sup> Troy D Abel and Mark Stephan, 'Tools of Environmental Justice and Meaningful Involvement' (2008) 10 *Environmental Practice*, 152.

<sup>18</sup> Mohai, Pellow and Roberts, above n 4, 407.

<sup>19</sup> Cole and Foster, above n 6, 165.

<sup>20</sup> Rio Declaration on Environment and Development, June 1992, Principle 7.

<sup>21</sup> See, eg, Salmon, P 'Access to Environmental Justice' (Edited paper presented at Conference on Environmental Justice and Market Mechanisms: Key Challenges for Environmental Law, The University of Auckland, New Zealand, 5-7 March 1998) and Samuel Assembe Mvondo, 'Decentralized Forest Resources and Access of Minorities to Environmental Justice: An Analysis of the Case of the Baka in Southern Cameroon' (2006) 63 *International Journal of Environmental Studies* 681.

<sup>22</sup> See, eg, Walker, above n 4; Agyeman, above n 15.

county near London.<sup>23</sup> The UK now has a specific EJ think tank and social enterprise called 'Capacity', which provides links between community action and policy development to support individual, community and neighbourhood rights to a clean and healthy environment.<sup>24</sup> Capacity is also a co-founder of the UK Environmental Justice Network, a group that works with members, community groups, NGOs and the private and public sector to lobby and campaign for environmental justice in the UK.<sup>25</sup>

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<sup>23</sup> Walker, above n 4, 623.

<sup>24</sup> Capacity Global, *About Us* <<http://www.capacity.org.uk/home/about.html>>

<sup>25</sup> Capacity Global, *Networks and Partnerships* <<http://www.capacity.org.uk/policyandadvocacy/networks.html>>

## Definitions and application – academic consideration of environmental justice

The EJ movement still struggles with the question of definitions. In 1999, Robert Bullard, one of the most pre-eminent scholars in this area, described environmental justice to be the principle that 'all people and communities are entitled to the equal protection of environmental and public health laws and regulations'.<sup>26</sup> The movement has been known by several other names, including 'environmental racism', 'environmental classism' and 'environmental equity'. These terms are increasingly falling under the umbrella of EJ, which highlights the growing breadth of the idea.

When interviewed, Robert Bullard said:

[t]he environmental justice movement has basically redefined what environmentalism is all about. It basically says that the environment is everything: where we live, work, play, go to school, as well as the physical and natural world. And so we can't separate the physical environment from the cultural environment.<sup>27</sup>

Mick Hillman, on the other hand, has suggested that for many, environmental justice 'has become a civil rights issue in the same way as access to voting, employment and health services constitutes social and economic injustice'.<sup>28</sup> These comments highlight the broad definition of 'environment' encompassed in EJ and the strong links in the movement to human rights. It is important to contemplate how relevant these concepts are to application of EJ in the Australian context.

The definition or vision of an environmentally just society is also contested. It is helpful to visualise what an environmentally just society might look like: '[t]he vision of environmental justice is the development of a holistic, community based, participatory and integrative paradigm for achieving healthy and sustainable communities for all people'.<sup>29</sup> Currently in Australia there seems to be limited willingness to link human wellbeing to environment protection in environmental policy. In general the concepts are viewed and compartmentalised by governments and activists quite separately, perhaps with the exception of Doctors for the Environment, who 'aim to ... address the ill health resulting from damage to the natural environment'.<sup>30</sup> For example, examination of the VicHealth<sup>31</sup> website does not indicate the existence of a current project or program<sup>32</sup> relating to links between the health of the natural environment and human health.

On the definition of 'justice', opinions also differ. In recent years, the accepted definition of EJ in the US has evolved to incorporate more than just questions of distribution, or 'who gets what' of environmental harms and benefits. David Schlosberg has undertaken work focused on the 'justice' in environmental justice, incorporating four different notions: distribution, recognition, capabilities and participation.<sup>33</sup> Schlosberg's work is centred on what those in the movement — those who speak of it and those who call for it — understand to be 'justice' in the environmental context.

Of course, opinions continue to differ. But the developing view, as Schlosberg finds, is that EJ can no longer be viewed as a purely distributive problem; rather, the additional elements of recognition,

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<sup>26</sup> Mohai, Pellow and Roberts, above n 4, 407.

<sup>27</sup> Errol Schweizer, 'Environmental Justice: An Interview with Robert Bullard' (1999) July *Earth First! Journal* <<http://www.ejnet.org/ej/bullard.html>>.

<sup>28</sup> Hillman, 'Environmental Justice', above n 2, 350.

<sup>29</sup> Cory Fleming and Katrena Hanks, 'Not Business as Usual: Using Collaborative Partnerships to Address Environmental Justice Issues' (Report, International City/County Management Association, 2004).

<sup>30</sup> Doctors for the Environment, *Our Vision* <[http://dea.org.au/about/file/our\\_vision](http://dea.org.au/about/file/our_vision)>.

<sup>31</sup> The Victorian Health Promotion Foundation (better known as VicHealth) is a Victorian Government Foundation working in partnership with organisations, communities and individuals to make health a central part of daily life and focusing on promoting good health and preventing ill-health. Victorian Health Promotion Foundation, *About Us* <<http://www.vichealth.vic.gov.au/About-VicHealth/About-Us.aspx>>.

<sup>32</sup> Victorian Health Promotion Foundation, *Programs and Projects* <<http://www.vichealth.vic.gov.au/Programs-and-Projects.aspx>>.

<sup>33</sup> David Schlosberg, *Defining Environmental Justice: Theories, Movements and Nature* (Oxford University Press, 2007).

capabilities and participation often underlie environmentally unjust outcomes.<sup>34</sup> In this regard EJ is a substantially different concept to what it was when it began.<sup>35</sup>

Reflecting this evolution, the US EPA's definition of EJ in 2001 is as follows:

[T]he fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, an enforcement of environment laws, regulations, and policies. ... It will be achieved when everyone enjoys the same degree of protection from environmental and health hazards and equal access to the decision-making process to have a healthy environment in which to live, learn and work.<sup>36</sup>

### **Discussion paper questions**

1. *Is the US definition of EJ applicable to Australia, or must we further explore the similarities and differences between Australia and the US?*

2. *Should environmental justice relate to rights of individuals and/or should it be applicable to communities and cultural groups?*

As discussed, the EJ movement began with a narrow focus: the burdens of pollution, the risks associated with waste and industrial sites, and how these burdens and risks were distributed, particularly among ethnic minorities. The application of the concept is much broader today, with a rapidly expanding application across a variety of disciplines and environmental themes. These include, for example, environmental inequalities relating to air pollution,<sup>37</sup> planning,<sup>38</sup> access to food,<sup>39</sup> flood disaster,<sup>40</sup> access to open space,<sup>41</sup> transportation,<sup>42</sup> forest management,<sup>43</sup> river management,<sup>44</sup> climate change<sup>45</sup> and transnational dumping of waste.<sup>46</sup>

Not only is the range of definitions and application of EJ very broad, the study of the principles of environmental equity and justice in academia have also been informed by a large variety of disciplines (and by those with very diverse backgrounds).

Gordon Walker, a geographer, devoted himself to exploring the 'multiple spatialities' of EJ and why this is important for understanding substantive claims of environmental injustice in different contexts.<sup>47</sup> In his 2005 book, Julian Agyeman developed a 'Just Sustainability Paradigm' to be used to reconcile the differences in approaches between the EJ movement and the traditional environmental/sustainability

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<sup>34</sup> Ibid.

<sup>35</sup> Walker, above n 4, 617.

<sup>36</sup> US EPA, *Environmental Justice* (9 November 2011) <<http://www.epa.gov/environmentaljustice/>>

<sup>37</sup> See, eg, Rachel Morello-Frosch, Manuel Pastor Jr and James Sadd, 'Integrating Environmental Justice and the Precautionary Principle in Research and Policy Making: The Case of Ambient Air Toxics Exposures and Health Risks among Schoolchildren in Los Angeles' (2002) 584 *Annals of the American Academy of Political and Social Sciences*, 47.

<sup>38</sup> See, eg, Wilson, Hutson and Mujahid, above n 11.

<sup>39</sup> See, eg, Orrin Williams, 'Food and Justice: The Critical Link to Healthy Communities' in David Naguib Pellow and Robert J Brulle (eds) *Power, Justice, and the Environment: A Critical Appraisal of the Environmental Justice Movement* (MIT Press, 2005) 117.

<sup>40</sup> See, eg, Robert D Bullard and Beverly Wright (eds), *Race, Place, and Environmental Justice after Hurricane Katrina: Struggles to Reclaim, Rebuild and Revitalize New Orleans and the Gulf Coast* (Westview Press, 2009).

<sup>41</sup> See, eg, Jennifer Wolch, John P Wilson and Jed Fehrenbach, 'Parks and Park Funding in Los Angeles: An Equity-Mapping Analysis' (2005) 26 *Urban Geography* 4.

<sup>42</sup> See, eg, Robert D Bullard, 'Environment and Morality: Confronting Environmental Racism in the United States' (Identities, Conflict and Cohesion Programme Paper No 8, United Nations Research Institute for Social Development, 2004); and Weir, Megan, Charlie Sciammas, Edmund Seto, Rajiv Bhatia and Tom Rivard, 'Health, Traffic, and Environmental Justice: Collaborative Research and Community Action in San Francisco, California' (2009) 99(s3) *American Journal of Public Health* S499.

<sup>43</sup> See, eg, Mvondo, above n 21.

<sup>44</sup> See, eg, Mick Hillman, 'Situating Justice in Environmental Decision-Making: Lessons from River Management in Southeastern Australia' (2006) 37 *Geoforum* 695.

<sup>45</sup> See, eg, Walker, above n 4.

<sup>46</sup> See, eg, David Naguib Pellow, *Resisting Global Toxics: Transnational Movements for Environmental Justice* (MIT Press, 2007).

<sup>47</sup> Walker, above n 4.

movement.<sup>48</sup> Julie Sze and Jonathan K. London think that it is useful to look at the EJ concept as a form of social praxis — that is, what emerged from the intersection of a social movement, public policy and academic research.<sup>49</sup> They argue that a restrictive boundary should not be imposed around the concept of environmental justice and that its wide-ranging and integrative character should be embraced.

In 2000, University of Colorado sociologist David Pellow deliberated upon an environmental inequality formation to address conceptual, theoretical and methodological issues in the literature on environmental injustice.<sup>50</sup> He argued that to achieve greater theoretical sophistication and policy relevance, EJ research must move towards a deeper understanding of environmental inequality, but in a broader way. He believed that environmental inequality should not be viewed as simply 'the result of perpetrator-victim scenarios'<sup>51</sup> and should move away from focusing on only one location or site of conflict. In this context, Pellow later applied EJ principles to the problem of the international trading and dumping of hazardous wastes.<sup>52</sup>

Significant work has been done relating to responses to the problem of climate change in an EJ framework. The 'geographies of responsibility' approach advocated by Gordon Walker,<sup>53</sup> for example, makes the case that the producers of the largest amount of air pollution take on a proportionate responsibility to mitigate this.<sup>54</sup> In Australia, federal Parliament has just passed legislation to regulate the carbon dioxide emissions of the largest polluting companies with the aim of reducing the overall carbon pollution of the country.<sup>55</sup> Australia is the largest producer of carbon emissions per head of population in the world, but due to its comparatively small population, contributes only 1.5% in total to global emissions.<sup>56</sup> Despite this, and widespread arguments that a reduction in Australia's carbon emissions will have no impact on reducing global emissions,<sup>57</sup> the federal Government has pushed ahead with this reform, with this statement:

Global action is required if we are to avoid dangerous climate change. By taking action to reduce our own emissions, we lend momentum to international negotiations and put ourselves in a better position to promote strong mitigation action by other countries.<sup>58</sup>

Without calling it such, the current federal Government in Australia has embraced the 'geographies of responsibility' approach advocated by Walker. As perpetrators of the largest amount of carbon pollution per capita, responsibility has been taken to mitigate this. This demonstrates that some elements of EJ discourse are already occasionally evident in debate and discussion in Australia, although they are rarely explicitly identified as such.

### **Discussion paper question**

#### *3. What are the advantages of adopting EJ terminology and analysis in policy development in Australia?*

As discussed, research on environmental justice specifically in Australian academia has been relatively sparse. The exception to this is Nicholas Low and Brendan Gleeson's book from 1998, *Justice, Society and*

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<sup>48</sup> Julian Agyeman, *Sustainable Communities and the Challenge of Environmental Justice* (New York University Press, 2005).

<sup>49</sup> Julie Sze and Jonathan K London, 'Environmental Justice at the Crossroads' (2008) 2 *Sociology Compass* 1331.

<sup>50</sup> Pellow, 'Environmental Inequality Formation', above n 3.

<sup>51</sup> *Ibid*, 588.

<sup>52</sup> Pellow, *Resisting Global Toxics*, above n 46.

<sup>53</sup> See Walker, above n 4.

<sup>54</sup> *Ibid*, 624.

<sup>55</sup> *Clean Energy Act 2011* (Cth); Lenore Taylor, 'Senate Passes Carbon tax', *The Age* (Online) 8 November 2011 <<http://www.theage.com.au/environment/climate-change/senate-passes-carbon-tax-20111108-1n4p1.html>>.

<sup>56</sup> Australian Government, *Australia's Carbon Pollution: The Global Context* (8 August 2011) Clean Energy Future <<http://www.cleanenergyfuture.gov.au/australia%E2%80%99s-carbon-pollution-the-global-context/>>

<sup>57</sup> See, eg, James Pearson, 'Opinion: Is the Carbon Tax Good Policy?', *Perth Now* (Online) 8 November 2011 <<http://www.perthnow.com.au/opinion-is-the-carbon-tax-good-policy/story-fn6mh7xb-1226189266343>>.

<sup>58</sup> Australian Government, above n 47.

*Nature: An Exploration of Political Ecology*,<sup>59</sup> which examined the philosophy of justice as it applies to environmental and ecological issues. Mick Hillman provided another rare contribution to the discussion from an Australian perspective in 2002, describing environmental justice as a linking theme for community development workers and environmental activists to share ideas and resources and to build cross sectoral coalitions.<sup>60</sup> He went on to look at the importance of incorporating 'ecological justice', not just procedural and distributive aspects of environmental justice, into a sustainable approach to river management in south-eastern Australia<sup>61</sup> and concluded that these three elements of injustice are mutually dependent.

Academic literature has also contemplated the 'chicken and the egg' debate relating to distributive justice. That is, whether, for example, polluting facilities move into disadvantaged neighbourhoods, or whether disadvantaged families move in to areas around polluting facilities as it is the only place they can afford to live (and those with the means to do so avoid these areas). The latter has been used by industry and government to plead that they are not intentionally discriminating against either racial or ethnic minorities or the low-income communities, and that when deciding where to locate a new facility, industry looks to where land is cheap and labour is readily available.<sup>62</sup> Then, once the facility is sited (and the facility starts negatively impacting the quality of life of residents) the socioeconomic composition of the neighbourhood usually changes. This is because the better resourced residents will want to leave the neighbourhood, and will do so. Poorer residents without the means will be left behind.<sup>63</sup> The price of land will drop (due to the sudden unpopularity of the area) and housing in the area becomes more affordable to disadvantaged groups, further concentrating the poor populations around the facility. In many instances, both phenomena occur — a facility is imposed on a disadvantaged community in the first place, and then this disadvantage is exacerbated as time goes on. The Victorian case study of Tullamarine toxic waste dump is a good example of this occurrence, as discussed further on in this paper.

The movement in the US is much more preoccupied with whether or not disadvantaged communities are systematically selected for the location of noxious facilities than the rest of the world, or as Luke Cole put it, 'insist[ent] on establishing a linear, causal connection between disproportionate outcomes and a "single bad actor"'.<sup>64</sup> On the other hand, the movement in the UK endorses a 'regardless of reasons' approach, arguing that it is 'impact' not 'intent' that is important. That is, regardless of the reason for the location of polluting factories, it is clear that poor communities are hit hardest by industrial pollution and that this should be the focus of the EJ movement.<sup>65</sup>

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<sup>59</sup> Nicholas Low and Brendan Gleeson, *Justice, Society and Nature: An Exploration of Political Ecology* (Routledge, 1998).

<sup>60</sup> Hillman, 'Environmental Justice', above n 2.

<sup>61</sup> Hillman, 'Situated Justice in Environmental Decision-Making', above n 44.

<sup>62</sup> Mohai, Pellow and Roberts, above n 4.

<sup>63</sup> Ibid.

<sup>64</sup> Cole and Foster, above n 6.

<sup>65</sup> Agyeman, 'Constructing Environmental (in)Justice', above n 15.

## Environmental justice – application in Australia

In stark contrast to the 30 years of progress in this area in the US, the words 'environment' and 'justice' are infrequently uttered in the same sentence in Australia. Why is that?

However, firstly, why is it that there is value in talking about environmental justice in Australia at all? If we accept that the issues that fall within the broad ambit of EJ are already to some extent recognised and discussed, might it be considered to be merely a catchy title for an existing collection of ideas?

EDO believes that it is important to communicate to the broader public that environmental protection isn't merely about animals and trees, clean air, or water, but that there are strong links between the health of the environment and the health and wellbeing of humans. Using the EJ framework to advocate for the interconnected ideas of environmentalism, social justice and human rights might help us think and talk about each of them more clearly and more prominently. It may also present opportunities to partner with people and bodies who would not otherwise see themselves as concerned with environmental protection issues. The union movement, for example, is unlikely to pay very much attention to the environment until it is framed as a social justice issue.

It is useful to look to the UK for guidance on how traction around EJ might be created in Australia. In his 'Transatlantic Tales' article, Julian Agyeman discusses the currently evolving EJ movement in the UK and its similarities and differences to the movement in the US: 'In the UK, there is an emerging call for environmental justice, but there is no comparable Civil Rights movement, just a well-organised if very unrepresentative environment movement'.<sup>66</sup>

The same could be said for Australia. In the absence of any enforceable civil or human rights framework, or indeed a strong political agenda for racial equality, EJ in Australia might gain most traction by linking itself to particular socioeconomic or geographic groups relevant to our society. For example, cost of living burdens for people who live in the outer suburbs and the particular challenges faced by farmers and rural people are very powerful political narratives in Australia. Framing EJ discussions around these issues might give the concept the momentum in Australia that issues around race created in the US.

'Quite simply, to most in the UK, the words "environmental" and "justice" do not sit easily together'.<sup>67</sup> Can the same be said of Australia? In the most part, it can be said that the mainstream environmental movement does not prioritise social justice and equity issues: prominent environmental non-government organisations (**NGOs**) treat the interrelation between environment and justice as incidental rather than inextricable. Friends of the Earth Australia must be cited as the exception to this, having strong environmental justice threads in its operations and running specific campaigns linking environmental protection to broader social concerns.<sup>68</sup>

### *Discussion paper question*

*4. In general, is it true that disadvantaged and ethnic minority people are unrepresented in the environment movement in Australia as a whole? Further, is the concept of 'environment' as understood and used by environmental NGOs in Australia one that is generally defined by the white, educated, middle class?*

There are other groups working in the EJ space in Australia, although predominantly in the context of climate change. The Brotherhood of Saint Laurence has been a leader in conceptualising climate change as a poverty issue.<sup>69</sup> The Australian Council of Social Services (**ACOSS**) are advocating for equitable

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<sup>66</sup> Agyeman, 'Constructing Environmental (in)Justice', above n 15.

<sup>67</sup> Ibid, 33.

<sup>68</sup> Friends of the Earth Australia, *About Us* < <http://www.foe.org.au/about-us>>.

<sup>69</sup> Brotherhood of St. Laurence, *Equity and Climate Change* (28 October 2011) <<http://www.bsl.org.au/Equity-and-climate-change>>.

solutions to the effects of climate change, so that low-income households are shielded.<sup>70</sup> The Australian Council of Trade Unions (**ACTU**) is also active in climate change policy.<sup>71</sup> Both ACOSS and ACTU are founding members of the Southern Cross Climate Coalition, an alliance aiming to lead an effective and fair response to climate change.<sup>72</sup>

However, in general, the discussion around 'saving the environment' conducted by most environmental NGOs has at its core the value of nature for nature's sake. The focus is steered away from value being attributed to the environment only if a human can use or enjoy it and towards nature having an intrinsic value. Discussions around environmental justice in the EDO Victoria office consistently raise the question: what about rights for the environment and nature, independent of humans?

It has been said of the US that the focus on the unjust distribution of environmental hazards close to disadvantaged communities 'has created a tension in contemporary environmental discourse between the need for a universal move towards environmental sustainability and the environmental justice movement's major concern for addressing the specific problems of disadvantaged groups'.<sup>73</sup> Further, 'there is not a consensus among environmentalists on whether broadening environmentalism to include justice is always a good idea'.<sup>74</sup> Similarly, Agyeman reports that '[t]he relationship between environmental justice and sustainability groups has traditionally been uneasy'.<sup>75</sup> It is possible that similar reactions will be present among Australian environment groups when confronted with the concept of EJ.

So what is ecological justice, and how does it relate to environmental justice? Low and Gleeson put in succinctly: 'Environmental Justice is about the fair distribution of good and bad environments to humans. Ecological justice is about fair distribution of environments among all inhabitants of the planet'.<sup>76</sup> They go on to say: 'Making the environment "human" ... does not dispose of the questions of ecological justice. A good environment for humans is not necessarily the same thing as a good environment for non-human nature'.<sup>77</sup> Hillman is also of the view that it is important to recognise and be conscious of the 'distinction between environmental justice, "the distribution of environmental quality among people", and ecological justice, a concern for "responsible relationships between human and the non-human natural world"'.<sup>78</sup> David Schlosberg has also looked at the challenges involved with linking liberal and distributional notions of justice to future generations of human and to nonhuman nature.<sup>79</sup>

### **Discussion paper questions**

*5. How can we reconcile a focus on environmental impacts on disadvantaged communities with overall good outcomes for the conservation of nature? Is it foreseeable that in certain circumstances a good EJ outcome might infringe on ecological justice?*

*6. What might be barriers to environment NGOS engaging with environmental justice principles?*

It is important to the EDO that we give detailed thought to these tensions and how environmental justice and ecological justice might comfortably co-exist. As discussed above, players in the environment movement in Australia (many of whom are existing clients, friends and supporters of the EDO) might be uneasy with introducing 'human-centric' values to the environment dialogue. At the same time, there is

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<sup>70</sup> See Australian Council of Social Service ('ACOSS'), 'ACOSS Calls for Boldness in Response to Climate Change' (Media Release, 27 June 2011)

<[http://www.acoss.org.au/media/release/acoss\\_calls\\_for\\_boldness\\_in\\_response\\_to\\_climate\\_change](http://www.acoss.org.au/media/release/acoss_calls_for_boldness_in_response_to_climate_change)>.

<sup>71</sup> Australian Council of Trade Unions ('ACTU'), *Campaign: Climate Change and Jobs* <<http://www.actu.org.au/Campaigns/ClimateChangeJobs/default.aspx>>.

<sup>72</sup> ACOSS, *Climate* (2010) <[http://www.acoss.org.au/policy/climate\\_energy/](http://www.acoss.org.au/policy/climate_energy/)>.

<sup>73</sup> Hillman, 'Situated Justice in Environmental Decision-Making', above n 44, 695.

<sup>74</sup> Mohai, Pellow and Roberts, above n 4, 407.

<sup>75</sup> Agyeman, *Sustainable Communities and the Challenge of Environmental Justice*, above n 48.

<sup>76</sup> Low and Gleeson, above n 59, prologue.

<sup>77</sup> Ibid, 49.

<sup>78</sup> Hillman, 'Situated Justice in Environmental Decision-Making', above n 44, 696.

<sup>79</sup> Schlosberg, above n 33.

great potential that in explicitly adopting environmental justice language and analysis (if done carefully), we might achieve a reframing and extension of some of the existing analyses and framing of issues by NGOs.

It is also interesting to contemplate *how* an EJ movement in Australia might organise, or how EJ frameworks and discussions might be adopted by groups. Will it be against the organising structure of the prominent environmental NGOs, or in conjunction with it? In the US, the former has occurred and there is a separate EJ movement distinct from the mainstream environmental movement. Conversely, in the UK, the major focus on EJ has been *through* the Friends of the Earth's two UK-based offices.<sup>80</sup>

### ***Discussion paper questions***

*7. Will an EJ movement in Australia form as a new wave of environmentalism? Or might it evolve from another space, such as the social movement or the welfare sector?*

*8. Would the formation of an Environmental Justice Network, similar to what exists in the UK, be beneficial for raising the profile of EJ in Australia and encouraging discourse and collaboration around EJ concepts?*

Simultaneously to the EDO becoming aware of and engaged in the concept of EJ, the Victorian EPA expressed interest in considering how the concept might be developed and applied by them in a regulatory context. The Victorian EPA 'Compliance and Enforcement review' report includes a discussion of the relevance of US EPA's EJ principles to the work of the Victorian EPA, and says:

In becoming more authoritative and a trusted source of information regarding the state of the environment and any health risk, it is important that EPA is vigilant regarding any trends in incidents or exposure that would impact on vulnerable populations or sensitive receiving environments.<sup>81</sup>

It goes on to make the following recommendation:

In consultation with community and business, EPA should consider developing a policy position on environmental justice, to guide it in decision making.<sup>82</sup>

EDO understands from discussions with the Victorian EPA that it is currently drafting an 'Environmental Citizenship Strategy' for development of policy in line with the above recommendation. EDO encourages this and will liaise with the Victorian EPA throughout the course of this study to keep informed of and, if possible, contribute to these developments.

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<sup>80</sup> Agyeman, 'Constructing Environmental (in)Justice', above n 15, 50.

<sup>81</sup> Krpan, Stan, *Compliance and Enforcement Review: A Review of EPA Victoria's Approach* (Report, Environment Protection Authority Victoria ('Victorian EPA'), February 2011) 304.

<sup>82</sup> Ibid.

## Environmental Justice and the EDO

EDO is a not-for-profit community legal centre specialising in public interest environmental law. The clients we serve include individuals, community groups and conservation groups who become involved in an environment protection dispute or need to use the law in some way to protect the environment. People who approach EDO for advice or assistance are not required to undergo a means test to qualify for that assistance. EDO applies a merits test to applications, which means that if assistance to the applicant might result in protection of the environment or an improvement to environmental laws, then that application for assistance will likely be successful (dependent on resources).

Generally speaking, those that seek out our services are those who can be categorised as environmentally conscious or 'green', or have a direct interest in the conservation of nature. Generally speaking, these people are educated and middle-class. Generally speaking, they are not representative of an ethnic minority, they are not of Aboriginal or Torres Strait Islander descent and they are not otherwise socially or economically disadvantaged.

EDO is conscious of the 'halo' effect discussed by Mike Hillman in his paper from 2002;<sup>83</sup> that is, the phenomenon of placing different values on ecosystems depending on their location and the social status and political influence of residents. A good example of this in the Victorian context is the attention given to the conservation of the environment in outer Eastern Melbourne, compared to in East Gippsland, due to the different socioeconomic make-up of these areas and the respective abilities of communities to participate in the environmental movement as a result.

One interpretation is that because the EDO does not get approached by members of disadvantaged or marginalised communities, that these communities 'don't care' about the environment. EDO does not agree with this conclusion. The US experience has shown that these communities do care about the environment, but they do so in a different frame; one of 'quality of life' rather than the traditional 'green' context. The ability of these communities to engage with environmental decision-making processes is also different due to education rates and political disempowerment.

But what even is the role of a legal organisation, like the EDO, in the environmental justice space? One thing that is clear from the academic literature is that environmental justice is not a legal movement or a concept in law. This is demonstrated by the rich body of existing literature on this topic derived from a variety of disciplines — economists, sociologists, activists, lawyers, community developers, and educators.

Some research goes so far as to say that the involvement of lawyers should be minimised or excluded from the movement. The article by Anna-Maria Marshall in 2010 examines the way that one environmental justice organisation in the US, the Centre for Health, Environment and Justice, advised its members about litigation and legal strategies for addressing EJ issues. In summary '[e]nvironmental justice activists vigorously discourage the use of strategies such as litigation, primarily because such strategies take control over the movement out of the hands of the local leadership and turn it over to professionals'.<sup>84</sup> Marshall concludes that the environmental justice movement overwhelmingly prefers mass mobilisation and direct action to litigation, which are 'elitist tactics taking the struggle out of the hands of ordinary people'.<sup>85</sup> Mohai et al agrees that 'the general strategy of using legal actions to achieve justice in cases of environmental inequality has not fared well'.<sup>86</sup>

However, as pointed out by Luke Cole and Shelia Foster (who are both lawyers), 'since so much of environmental decision making is structured by legal institutions, it is important to understand the ways in

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<sup>83</sup> Hillman, 'Environmental Justice', above n 2.

<sup>84</sup> Anna-Maria Marshall, 'Environmental Justice and Grassroots Legal Action' (2010) 3 *Environmental Justice* 147, 147.

<sup>85</sup> *Ibid*, 150.

<sup>86</sup> Mohai, Pellow and Roberts, above n 4, 410.

which environmental laws can both contribute to and mitigate the injustice experienced by many communities'.<sup>87</sup>

### ***Discussion paper question***

*9. In Australia, what role might lawyers play in establishing EJ frameworks and encouraging an EJ movement? And to what extent should the concept be categorised as a one of law?*

As discussed in this paper, in the US, hundreds of studies have documented the existence of environmental inequalities – that is, in general, that low-income and otherwise disadvantaged communities confront a higher burden of environmental exposure from industrialisation and other practices.<sup>88</sup> There has been one such study in the UK.<sup>89</sup> Anecdotally and intuitively, EDO through its work believes environmental injustices do exist in Australia. However, to date there has been no documentation or mapping of these injustices.

### ***Discussion paper question***

*10. To what extent do environmental injustices exist in Victoria? How can the principles of EJ be used to identify priority unmet needs and to develop appropriate and effective methods for meeting these needs?*

One of the objectives of this research is to draw attention to and provoke discussion around the existence of environment injustices in Victoria and Australia, and what fundamental shifts in law, policy and activism might be possible to respond to this. For this reason it is thought that an exercise to investigate any correlation between environmentally harmful industries and socioeconomic distribution would be of use.

EDO has secured pro-bono support from a planning academic and a planning master's student to undertake a basic mapping exercise to look into this issue. This research will be done in parallel to the main EJ project – the subject of this discussion paper – and will be the first of its kind in Australia.

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<sup>87</sup> Cole and Foster, above n 6, 11.

<sup>88</sup> Mohai, Pellow and Roberts, above n 4.

<sup>89</sup> See Friends of the Earth, above n 68.

## Environmental justice case studies

From its experience, EDO has identified three examples of communities that are likely to be disadvantaged from an EJ perspective. We propose to consult with these communities and explore how EJ might be a useful concept for identifying priority areas of their unmet needs and helping them to achieve environmental justice.

The final discussion paper will present a summary of findings and recommendations arising out of the three case studies, focussed on the ability of certain communities to access environmental justice. Involvement of the communities identified for the case studies at each stage of the project is a key feature of the study.

The case studies have been selected by the EDO as examples of areas that preliminary data and experience suggest warrant further attention. The breadth of the case studies is intended to allow a full exploration of the different contexts in which 'environmental justice' might be a useful guiding concept.

The case studies are:

1. The Tullamarine toxic waste dump, 1972–current, and the community experiences with the regulation of this facility by the Victorian EPA during its operation and closure.
2. Involvement of affected Indigenous nations in the formulation of the Murray-Darling Basin Plan for the future management of the Murray Darling Basin.
3. Intensive animal industry in rural areas in Victoria and the experiences of those impacted.

### Case Study #1 – Tullamarine toxic waste dump

As discussed, the EJ movement in the US has its origins in community activism relating to the burdens of pollution and risk associated with toxic waste disposal sites. The first major EJ studies in the US to chart this disproportionate impact focused on commercial waste facilities and their associated risks to human health. In that regard, Tullamarine toxic dump north-west of Melbourne in the Hume City Council is a 'classic' EJ case study.

In the experience of the EDO, very little consideration has been given to the social and demographic dimensions of the distribution of risk from hazardous industry in Victoria. As noted, the Victorian EPA is only just commencing consideration of this issue.

The Tullamarine Hazardous Waste landfill (**dump**) commenced operations in 1972, and for the next 15 years received a broad range of hazardous wastes including millions of litres of liquid wastes such as heavy metals and polychlorinated biphenyls. By the mid-80s it became apparent to the communities living around the dump that depositing liquid wastes of this nature was environmentally dangerous and could have substantial impacts on the health of them and their families.

The Tullamarine Area Community Link for Environment (**TACLE**) formed in response to these concerns, following a public meeting, to advocate for the closure of the dump and its appropriate remediation. TACLE later became the Terminate Tulla Toxic Dump Action Group Inc (**TTTDAG**), which continues in existence today. This group has for years challenged the legitimacy of the decision-making process relating to the dump and the structures that allow such decisions to be made without the involvement of those most seriously impacted.<sup>90</sup>

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<sup>90</sup> See generally Terminate Tulla Toxic Dump Action Group Inc ('TTTDAG') *Home* (2006) <<http://tullatoxicdump.net/index.html>>.

From preliminary discussions with Helen Van Den Berg,<sup>91</sup> current secretary of TTTDAG, the community living in the area prior to the siting of the dump were working class, 'normal' people setting up house, with comparatively low rates of education. In the early 70s this community had the toxic waste dump, the Tullamarine airport and the Tullamarine freeway imposed on them all within the space of a few years. Since then, more people from disadvantaged backgrounds have moved in, exacerbating the low socioeconomic demographic. The overall result is that for decades in the area, poor people have been shouldering a greater burden of environmental harmful industry than others in Victoria.

The Tullamarine dump has been chosen as a case study due to the long history of the struggle of grassroots activism against the dump and the variety of perspectives available in this community regarding this experience. EDO has previously advised TTTDAG on legal issues relating to the toxic waste dump and has well-established contacts in the community. EDO has made contact with the community about this environmental justice study, and is able to consult with them readily on issues relating to this study. Consultation will be conducted primarily through interviews with affected residents and activists, and perhaps select group sessions if appropriate. Challenges in consulting include accessing those in the community who have declined to participate in the activism against the dump and opportunities to participate in decision-making processes; that is, those who have (for one reason or another) suffered from participatory injustices.

Case study areas of investigation:

- 1. Is the community living around Tullamarine dump disadvantaged community from an EJ perspective? If so, why and how?**
- 2. What services did, or do, this community need to mitigate this disadvantage?**
- 3. What does 'meaningful participation' mean to this community, in their circumstances?**
- 4. How did this community find the ability to address their problems through legal avenues?**
- 5. Given the long history of activism against the dump, how would established principles of environmental justice have assisted this community in their discussions with government and industry, and to achieve their objectives relating to the dump?**

## **Case Study #2 – Indigenous involvement in the formulation of the Murray-Darling Basin Plan**

The environmental degradation of river systems provides an example of the separation of the sources and impacts of problems and thus is often a good illustration of environmental injustices. '[C]hanges to the connectivity of rivers, now recognised as a major source of ecological damage, may also have major implications for distributive and procedural justice'.<sup>92</sup> In Australia, an obvious example that springs to mind is salinity problems in the Murray-Darling Basin (**Basin**). These are widespread across the Basin, however the water supply of South Australia in the lower part of the Basin has been most seriously affected.

Since about 1975 in Australia there has been growing recognition within governments and the wider Australian community of the continuing cultural and economic relationship between Aboriginal people and Australia's landscape.<sup>93</sup> There are currently various mechanisms available for the involvement of

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<sup>91</sup> Interview with Helen Van Den Berg, Secretary, TTTDAG (Melbourne, 23 September 2011).

<sup>92</sup> Hillman, 'Situated Justice in Environmental Decision-Making', above n 44, 702.

<sup>93</sup> Toni Bauman and Dermoth Smyth, *Outcomes of Three Case Studies in Indigenous Partnerships in Protected Area Management* (Policy Briefing Paper, The Australian Collaboration and Australian Institute of Aboriginal and Torres Strait Islander Studies, 2007).

Aboriginal people in the management of protected areas, such as the development of formal co-management agreements between indigenous groups and organisations and government bodies.

Aboriginal people are now more widely consulted in environment and landscape management matters generally. Aboriginal people are also involved in cultural site management throughout Victoria, with representation on advisory committees and the responsibility for the management of cultural centres.<sup>94</sup> Still, it is the experience of the EDO that indigenous people and traditional owners are under-represented in environmental law decision-making processes and in attempts to access environmental justice.

Indigenous communities have for some time expressed a desire to be involved in the management of natural resources. This is particularly so with reference to the Murray-Darling Basin.<sup>95</sup> In the late 1990s traditional owners in the southern part of the Murray-Darling Basin mobilised an alliance called the Murray Lower Darling Rivers Indigenous Nations (**MLDRIN**). 'MLDRIN is a specific intervention by the traditional owners in water law, policy and management. It is also a positive expression of their political identity.'<sup>96</sup>

In 2007, a meeting of MLDRIN adopted the 'Echuca Declaration' — a set of processes for engagement and inclusion of the Indigenous Nations in the management of their rivers and waterways.<sup>97</sup> In addition to involvement in environmental management, Indigenous peoples have called for substantive involvement in policy and decision-making, that goes beyond mere 'consultation'.<sup>98</sup> There is a strong view<sup>99</sup> in academic literature that '[a] failure to acknowledge, let alone incorporate, indigenous perspectives into resource management, has vastly increased the damage and injustice associated with environmental degradation'.<sup>100</sup>

Libby Porter has done a significant body of work relating to the involvement of Aboriginal people in natural resource management in Victoria. She highlights some of the challenges:

... state-based environmental planning in Victoria continues to be blind to its own cultural constructions of place. Despite significant shifts in favor of (some) Aboriginal interests in relation to land use management, this has always occurred by defining an Aboriginal Other that can be brought safely into the existing regulatory regime without unsettling the ... philosophies that underpin that regime.<sup>101</sup>

Representatives of Indigenous Nations in the MDB have specifically examined indigenous involvement in the management of the MDB, and have highlighted their desire for both procedural and distributive rights relating to this:

Apart from the procedural mechanisms to ensure meaningful involvement of Indigenous Nations in decision-making and management, specific measures may be introduced to recognise substantive rights or specific interests that arise from Indigenous ownership and custodial responsibilities, including:

- Access to land and waterways;
- Use and enjoyment of the natural resources;
- Hunting, fishing and foraging; and
- Protection of cultural heritage and identity.<sup>102</sup>

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<sup>94</sup> Examples are Brambuk Cultural Centre and Gariwerd National Park.

<sup>95</sup> Monica Morgan, Lisa Strelein and Jessica Weir, *Indigenous Rights to Water in the Murray Darling Basin: In Support of the Indigenous Final Report to the Living Murray Initiative* (Research Discussion Paper No 14, Australian Institute of Aboriginal and Torres Strait Islander Studies, 2004).

<sup>96</sup> Weir, Jessica K, *Murray River Country: An Ecological Dialogue with Traditional Owners* (Aboriginal Studies Press, 2009) 91.

<sup>97</sup> Murray Lower Darling Rivers Indigenous Nations ('MLDRIN'), *MLDRIN Echuca Declaration* (Adopted by MLDRIN Delegates 14 November 2007).

<sup>98</sup> Morgan, LStrelein and Weir, above n 95.

<sup>99</sup> See, eg, Jonnalagadda Rajeswar, 'Conservation Ethics versus Development: How to Obviate the Dichotomy?' (2001) 9 *Sustainable Development* 16.

<sup>100</sup> Hillman, 'Environmental Justice', above n 2, 357.

<sup>101</sup> Libby Porter, 'Producing Forests: A Colonial Genealogy of Environmental Planning in Victoria, Australia' (2007) 26 *Journal of Planning Education and Research* 466, 474-5.

<sup>102</sup> Morgan, Strelein and Weir, above n 95, 7.

The federal Government of Australia developed the *Water Act 2007* (Cth) (**Water Act**) to enable the management of water resources in the Murray-Darling Basin in the national interest, to give effect to relevant international agreements, and to promote the use and management of resources to optimise economic, social and environmental outcomes.<sup>103</sup> The Water Act requires the development of a Basin Plan to limit the quantity of water that may be taken (**Basin Plan**).<sup>104</sup>

Aboriginal interests are only referred to indirectly in the Water Act, such as the requirement to 'have regard to ... social, cultural, Indigenous ... issues',<sup>105</sup> in developing the Basin Plan and for 'uses to which the Basin water resources are put'<sup>106</sup> in the Basin, including uses by Indigenous people, to be mandatory content within the Basin Plan.<sup>107</sup> The Water Act falls short of a holistic approach to water allocations and recognising the rights of Aboriginal communities to water for cultural purposes. '[T]he difficult task of determining how best to manage the scarce water resources of the Murray River cannot side-step the inherent rights of Indigenous Nations to the use, access, enjoyment and economic utility of the water of the Murray.'<sup>108</sup>

The Water Act also allows for the creating of the Murray-Darling Basin Authority (**MDBA**), which has one main role: developing and implementing the Basin Plan as provided for under the Water Act.<sup>109</sup> An agreement made at a Council of Australian Governments' Meeting on 26 March 2008 stipulates the provision of the Basin Plan by early 2011.<sup>110</sup> Several consultation processes have been conducted by the MBDA to feed in to a draft Basin Plan, including the release of a Guide to the Murray-Darling Basin Plan in October 2010 for consultation (**Guide**).

On 28 November 2011 a draft Basin Plan was released to the Australian public proposing a framework for the future management of the Murray-Darling Basin System. This commences a 20-week consultation period, in which people can 'help ... to develop the Basin Plan'.<sup>111</sup>

This case study will examine the extent to which Indigenous voices are being heard in the process of the Commonwealth Government of Australia formulating the Basin Plan and deciding the future management of Australia's largest river system, and the ability of affected indigenous communities to participate in consultation processes. The case study was chosen due to the EDO's concern at around the time of the release of the Guide in October 2010, when passionate and vigorous debate that then exploded,<sup>112</sup> but the voices of the traditional owners in this debate were lacking. Contact has been made with elders of the nations that live in the Basin areas, and consultation will be conducted primarily through personal interviews.

Case study areas of investigation:

- 1. Are indigenous nations living in the Basin disadvantaged from an EJ perspective? If so, why and how?**
- 2. What services do these community need to mitigate this disadvantage?**
- 3. What does 'meaningful participation' mean to these communities, in their circumstances?**

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<sup>103</sup> *Water Act 2007*(Cth) s 3.

<sup>104</sup> *Ibid* ss 6, 19.

<sup>105</sup> *Ibid* s 21(4)(c)(v).

<sup>106</sup> *Ibid* s 22.

<sup>107</sup> *Ibid*.

<sup>108</sup> Morgan, Strelein and Weir, above n 95, 35–6.

<sup>109</sup> *Water Act 2007* (Cth) s 172.

<sup>110</sup> Council of Australian Governments ('COAG'), *Murray-Darling Basin Reform* (Memorandum of Understanding, 26 March 2008) in COAG, 'COAG reform Agenda: Reforming and Investing for the Future' (Communiqué, COAG Meeting, Adelaide, 26 March 2008) attachment A <[http://www.coag.gov.au/coag\\_meeting\\_outcomes/2008-03-26/index.cfm#tabs](http://www.coag.gov.au/coag_meeting_outcomes/2008-03-26/index.cfm#tabs)>.

<sup>111</sup> Murray-Darling Basin Authority, *Draft Plan Now Available and 20 Weeks of Consultation Begins* (28 November 2011) <[http://www.mdba.gov.au/media\\_centre/media\\_releases/draft-basin-plan-for-public](http://www.mdba.gov.au/media_centre/media_releases/draft-basin-plan-for-public)>.

<sup>112</sup> See, eg, Daniel Wills, 'Water Report Inflames Farmers', *Adelaide Now* (online), 15 October 2010 <<http://www.adelaidenow.com.au/news/in-depth/water-report-inflames-farmers/story-e6frebju-1225938897001>>.

**4. Would having established principles of environmental justice assist these communities in achieving their objectives relating to the management of the Murray Darling basin system?**

**Case Study # 3 – Rural communities and intensive animal industries**

Several studies have illustrated that rural communities may be exposed to environmental hazards regardless of their ethnic and racial make-up or income level, and face vulnerability to those hazards due purely to the fact that they live in a rural area.<sup>113</sup> In this sense rural communities are an atypical environmental justice community, and these types of communities have not received very much attention in EJ studies in Northern America.

EDO statistics consistently demonstrate that about half of the users of our telephone advice service live outside the metropolitan area. We wonder whether it is true in Victoria that the 'rural-ness' of a community affects its vulnerability to environmental hazards. EDO saw in the case of the fight against the construction of the desalination plant in Wonthaggi, Victoria, that rural residents often lacked the political power necessary to make state and federal governments listen to their views on environmental protection. EDO has also identified of late an increase in demand for legal services from farmers and land-holders affected by coal mining and coal seam gas exploration licences.

Over the years EDO has received a number of requests for advice from members of communities who have been severely impacted by smell, noise and air quality associated with proximity to facilities housing intensive animal industries such as broiler farms and feedlots. The third case study for this project will look at the extent to which rural communities have been able to participate in land use planning processes relating to these types of projects, and their ability to access procedural justice.

Case study areas of investigation:

- 1. Are rural communities disadvantaged from an EJ perspective? If so, why and how?**
- 2. What services do communities impacted by intensive animal industry in rural areas need to mitigate this disadvantage?**
- 3. What does 'meaningful participation' mean to these communities, in their circumstances?**
- 4. Have these communities attempted to address issues via legal avenues? To what extent have these attempts been successful?**
- 5. Would having established principles of environmental justice assist these communities in achieving their objectives relating to intensive animal industry facilities?**

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<sup>113</sup> See Celia Carroll Jones, 'Environmental Justice in Rural Context: Land-Application of Biosolids in Central Virginia' (2011) 4 *Environmental Justice* 1; King, Tanya J, 'Damming the Flow: Cultural Barriers to Perceived "Procedural Justice" in Wonthaggi, Victoria' (2010) 16 *Cultural Studies Review* 119.