

Environment & Planning Alert

Implied limits on CO₂ emissions in NSW Environment Protection Licences?

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Outline

The NSW Court of Appeal has held that there is no implied condition in Macquarie Generation's environment protection licence which limits CO₂ emissions from the Bayswater power station.

[Click here](#) for a full copy of the judgment in *Macquarie Generation v Hodgson* [2011] NSWCA 424.

The case provides licence holders under the *Protection of the Environment Operations Act 1997* with greater clarity about the conditions under which they operate their business. However, the issue of whether or not CO₂ is a 'waste' remains to be determined.

Bayswater power station

Development consent under the *Environmental Planning and Assessment Act 1979* for the Bayswater power station was obtained in September 1980. An environmental impact statement (EIS) dated June 1979 accompanied the development application.

The consent, granted by the Muswellbrook Shire Council, did not contain an express condition limiting the consumption of coal at the power station.

Electricity has been generated at the Bayswater power station through the burning of coal since 1996. In 2008, the station emitted some 14.1 million tonnes of CO₂.

At that scale, Macquarie Generation is required to hold

an environment protection licence (EPL) for 'electricity generation' under the *Protection of the Environment Operations Act 1997 (Act)*. Other 'Schedule 1 activities' undertaken at the premises also require licensing, including: 'waste activities' and 'waste facilities (coal wash landfill)'.

The relevant EPL was issued by the EPA subject to conditions which regulate the emission of identified pollutants (not CO₂), the annual monitoring of CO₂ emissions, and the disposal of solid and liquid waste.

The EPL does not have an express condition limiting the generation of electricity, coal consumption or CO₂ emissions.

LEC proceedings

In July 2009, proceedings were commenced in the NSW Land & Environment Court against Macquarie Generation in relation to the power station. The proceedings were commenced under the open-standing provisions in the Act.

The applicants sought declaratory and injunctive relief in relation to the emission of CO₂ from the power station, as the wilful or negligent disposal of 'waste' contrary to the Act.

In the Land & Environment Court, Pain J dismissed some of the applicants' claims, but granted leave for them to amend certain others. Importantly, Her Honour held, without making a final determination, that there was a reasonably arguable case about whether:

- the relevant EPL was subject to an implied condition limiting CO₂ emissions;
- the implied condition prevented Macquarie Generation from making CO₂ emissions which failed to have *'reasonable regard and care for the interests of other persons and/or the environment'*; and
- there was a limit of 7 million tonnes placed on the amount of coal that could be burnt at the power station, based on the EIS.

[Click here](#) for a full copy of Her Honour's decision in *Gray and Anor v Macquarie Generation (No.3)* [2001] NSWLEC 3.

The appeal

Macquarie Generation appealed to the Court of Appeal. For the reasons below, the Court allowed the appeal, dismissing the above claims without the need for a full hearing.

Test for an implied condition?

In determining whether the EPL was subject to an implied condition limiting CO₂ emissions, the Court of Appeal determined that:

- the express conditions of the EPL did not limit electricity generation, coal consumption or CO₂ emissions;
- the applicable test for implying a term in an EPL was the same as for the implication of conditions under contract law, being one of interpretation;
- the test was summarised in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266, namely, for a term to be implied it must:
 - be reasonable and equitable;
 - be necessary;
 - be so obvious *'it goes without saying'*;
 - be capable of clear expression; and
 - not contradict any express term;
- opposing these requirements, an implied limit on CO₂ emissions would in reality contradict the EPL; and
- in actual fact, it was necessary to imply a term into the EPL which permitted Macquarie Generation to emit CO₂ from the power station, *'because a licence to burn coal would otherwise be ineffective'*.

Thus, the Court of Appeal rejected any implied term in the EPL limiting CO₂ emissions.

Is an EIS automatically incorporated into EPLs?

In determining whether the EIS was automatically incorporated into the EPL, thereby restricting coal consumption to 7 million tonnes per annum, the Court of Appeal held that:

- the express conditions of the development consent did not limit coal consumption to 7 million tonnes per year;
- the Act does not provide for the automatic incorporation of an EIS, or any part of it, into an EPL;
- such a condition, *'based on a few lines in the EIS'*, could not be implied by a process of incorporation; and
- the EPA must take an EIS into consideration, as one of many matters, when exercising its licensing functions. The absence of an express condition limiting coal consumption to 7 million tonnes indicates that the EPA decided not to incorporate that into the EPL. That decision was for the EPA and not for the Court.

Indeed, Handley AJA observed that it:

'...would be remarkable if a few lines from an EIS and supplementary material of 142 pages prepared in 1979, which did not become a condition in the development consent, should be an implied term of a licence under an Act granted in 2008.'

For these reasons, the claimed implied condition limiting coal consumption to 7 million tonnes a year was also rejected.

Is CO₂ a 'waste'?

In *Massachusetts & Ors v Environmental Protection Agency & Ors* 549 U.S. 497 (2007), the United States Supreme Court decided that the US Environmental Protection Agency had the authority to regulate CO₂, and other 'greenhouse gases', under the *Clean Air Act* as an 'air pollutant', which was a defined term under that legislation.

While decisions like *Massachusetts* may provide some guidance to future judicial direction in Australia, in *Macquarie Generation (No.3)* Pain J did not finally determine whether or not CO₂ was a 'waste' for the purposes of the Act.

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One of the respondents' claims in the Court of Appeal was that Macquarie Generation did not have lawful authority under section 115 of the Act (concerning the disposal of 'waste') for emissions, in excess of the level imposed by the implied EPL condition.

However, the Court's rejection of any implied condition in the EPL rendered it unnecessary to determine whether CO₂ was a 'waste' under the Act. Therefore, some uncertainty remains about whether CO₂ is a 'waste' under the Act.

At the time of writing it is not known whether this matter will go on appeal to the High Court.

Related information

[Click here](#) to read our Environment & Planning Alert on the first time an Australian Court has imposed a condition of consent on a coal mine to offset direct greenhouse gas emissions, including fugitive emissions.

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