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Environment & Planning Alert

Greenhouse gas offsets – Imposed on a NSW mine

November 2011

Outline

Greenhouse gas emissions, climate change, ecologically sustainable development and the precautionary principle have, at different times, been considered in the NSW Land & Environment Court, for instance, in relation to:

- a power station at Warkworth in the Hunter Valley, see: *Greenpeace Australia v Redbank Power Co Ltd* (1994) 86 LGERA 143;
- the Anvil Hill mine in the Hunter Valley, see: *Gray v Minister for Planning & Ors* [2006] 152 LGERA 258;
- a retirement village at Sandon Point North of Wollongong, see: *Walker v Minister for Planning* [2007] NSWLEC 741; and
- a residential and commercial development at the former Carlton United Breweries site at Chippendale, see: *Drake-Brockman v Minister for Planning & Anor* [2007] NSWLEC 490.

Added to this, the Land & Environment Court has become the first Australian Court to determine that it is appropriate for greenhouse gas emissions to be offset as a condition of a planning approval.

Click here for a full copy of the judgment in *Hunter Environment Lobby Inc v Minister for Planning & Anor* [2011] NSWLEC 221.

The decision has implications, not only for coal mining but, more broadly, for businesses that are contemplating development which directly emits greenhouse gases, including fugitive emissions.

The Ulan Coal Mine

Ulan Coal Mines Ltd undertakes mining at the Ulan Coal Mine, which is about 40 kilometres North East of Mudgee near the headwaters of the Goulburn River catchment. The operations form part of Xstrata Coal NSW's assets.

In September 2008, Ulan Coal lodged an application with the NSW Department of Planning under Part 3A of the *Environmental Planning and Assessment Act* 1979 (**Act**) (now repealed).

The application sought to consolidate 27 existing development consents into a single approval for another 20 years of operation. The proposal included expansion of existing underground and open cut operations, with an increased annual production of up to 20 million tonnes of coal.

In December 2009, the Hunter Environment Lobby Inc made a written submission to the Department objecting to the proposal. Their objection raised the impacts the project would have on climate change, as one of their grounds for opposition.

In November 2010, the NSW Planning Minister approved the project under section 75J of the Act (now repealed), subject to conditions.

Part 3A of the Act was repealed on 1 October 2011. However, as an 'approved project' the proposed expansion is a 'transitional Part 3A project' and Part 3A continues to apply to it under Schedule 6A of the Act.

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The appeal

Dissatisfied with the approval, the Hunter Environment Lobby Inc (**Applicant**) appealed to the Land & Environment Court under section 75L of the Act (now repealed).

The Applicant argued that the expanded operations should be refused by the Court on several merit grounds, namely: inconsistency with the principles of ecologically sustainable development (**ESD**); groundwater and biodiversity impacts; greenhouse gas (**GHG**) emissions; and being in conflict with the objectives of certain Environmental Planning Instruments.

Alternatively, the Applicant contended that the planning approval should be modified by the imposition of more stringent conditions, including conditions to mitigate the mine's contribution to global anthropogenic climate change.

GHG offset conditions

Conditions 18 and 22 of the approved project addressed GHG emissions. They required minimisation of the release of GHG emissions from the site, and the preparation of an air quality and GHG management plan to the satisfaction of the Director-General.

The Applicant asserted that the project would exacerbate global anthropogenic climate change contrary to the principle of intergenerational equity. Relevant particulars included:

'...(h) Over the 20 year lifetime of the Project, the Project will emit scope 1, 2 and 3 greenhouse gas emissions totalling 575 million tonnes of carbon dioxide equivalents (TCO_2e);

(i) Scope 1 GHG emissions are direct emissions;

(j) Scope 2 GHG emissions are indirect emissions from the consumption of purchased electricity;

(k) Scope 3 GHG emissions are the indirect emissions and includes emissions generated from the burning of coal...'

The Applicant contended that conditions 18 and 22 were inadequate with regard to the extent of the scope 1 (direct), 2 (indirect) and 3 (by product of coal burning) GHG emissions of the project.

Ultimately, rather than seeking outright refusal of the project, the Applicant proposed conditions requiring, among other things, an offset for scope 1 and 2 emissions that exceeded an emissions budget. The proposed offsets included the purchase and surrender of Gold Standard Emission Reductions or Australian Carbon Credit Units.

The Minister and Ulan Coal opposed the imposition of the offset conditions.

The Applicant

In relation to the more stringent offset conditions, the Applicant argued that:

- the power to impose a condition is determined by reference to the scope, purpose and objects of the legislation. In Part 3A of the Act, the power being exercised under section 75J is not constrained by an Environmental Planning Instrument and is only constrained by the scope, purpose and objects of the Act (which include encouraging ESD); and
- the relevant question was whether the proposed conditions fell within the scope of the statutory power properly understood. The Applicant urged that ESD, specifically intergenerational equity, should be applied to the project.

The Minister and Ulan Coal

The Minister and Ulan Coal contended that:

- the power to impose conditions under section 75J of the Act was broad, but was not unfettered. The Act was not directed to worldwide environmental problems such as climate change, because the scale on which the Act operated was a local planning one;
- the imposition of any kind of GHG offset condition was invalid because it breached the three part test expressed in *Newbury District Council v Secretary of State for the Environment [1980] 1 All ER 731*;
- the proposed conditions were not for a 'proper planning purpose' (first 'Newbury test') against the objects of the Act, because they intended to implement broader climate change objectives;
- the proposed conditions did not 'fairly and reasonably relate to the development' (second 'Newbury test') because of the substantial financial burden involved; and
- the proposed conditions were 'unreasonable' (third 'Newbury test') because:
  - they were discriminatory, not being imposed on any other coal mine in NSW;
  - ESD and the precautionary principle require that any measure imposed to ameliorate an environmental risk should be practical and proportionate to the level of threat and uncertainty, and what was proposed by the Applicant was neither practical or proportionate; and
  - they required complete offsetting of GHG emissions which was inconsistent with Australia's commitment to reduce emissions by 5 per cent on year 2000 levels.

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LEC's decision

In determining the matter Pain J reviewed various authorities, in particular, the Court of Appeal's recent consideration of the 'Newbury test', and *Western Australian Planning Commission v Temwood Holdings Pty Ltd* (2004) 221 CLR 30, in *Botany Bay City Council v Saab Corporation Pty Ltd* [2011] NSWCA 308.

Click here for our Environment & Planning Alert on the *Botany Bay City Council v Saab* case.

Relevantly, Her Honour observed that:

'What emerges from... the authorities is that the power to impose conditions on an approval under Pt 3A is wide... The approach in Newbury as a test of the validity of a condition... has not been expressly endorsed, or rejected, by the Court of Appeal or the High Court... , and the comments by Basten JA in Botany Bay City Council v Saab, confirm that the starting point for consideration of a condition sought to be imposed on an approval is that is must be assessed by reference to the scope and purpose of the statutory power under which it is imposed.'

With regard to the authorities, Her Honour held that:

'...GHG emissions released directly and indirectly from the existing and proposed mine as scope 1 and 2 emissions contribute to an environmental impact which has local, regional and global impacts. As the purpose of the EPA Act includes the protection of the environment, the imposition of conditions to address GHG which are attributable to the project under Pt 3A are arguably within power... A condition requiring the offsetting of emissions directly attributable to the operation of the project, in order to address direct potential or actual adverse impacts on the environment, is related to the purpose of assessing and approving a significant extension of a coal mine...'

Scope 1 emissions

In relation to scope 1 emissions, Pain J concluded that a condition requiring Ulan Coal to offset the scope 1 emissions of the project would be within the scope and purpose of the power under section 75J of the Act.

Notably, Her Honour observed, in addressing submissions by the Minister and Ulan Coal that the imposition of an offset condition would be unreasonable and discriminatroy, that this is:

'...the first time the Court has had to consider the environmental issues raised by GHG impacts of a large coal mine in a merit review process... That this is the first such condition imposed on a coal mine in NSW is not necessarily discriminatory, it is simply the first occasion that this has occurred. I have found that it is otherwise lawful... I consider it can be implemented reasonably... As other operating coal mines seek approval to modify or extend their operations, or new coal mines are opened, it would be open to the consent authority... to impose a similar condition.'

Scope 2 emissions

In relation to scope 2 emissions, Pain J declined to impose a condition, because scope 2 emissions were not entirely under the control of Ulan Coal and consequently did not reasonably relate to the project. Further, Her Honour considered that such a condition would result in a poor policy outcome by removing the incentive for an electricity generator to reduce its own GHG emissions.

Consequently, Her Honour granted approval to the project, subject to conditions, including a condition requiring Ulan Coal to offset its scope 1 GHG emissions, being the direct emissions from the mining operations, including fugitive emissions.

The Land & Environment Court did not finally decide the exact wording of the offset conditions. Rather, Pain J sought alternative wording from the parties, to those proposed by the Applicant.

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