Non-compliant earthworks

Prior to the lapsing date the applicant carried out earthworks. The RMS argued that those works had been done in breach of condition 9 because Council had only approved plans for parts of the development, but not all of the development at the time the works were done. The applicant argued that condition 9 was inapplicable because it should be construed as applying to each phase of the development, including bulk earthworks which had been approved by Council.

The judge was not inclined to read down condition 9 so that it applied only to each phase of the works, including bulk earthworks, because it was unjustified and did undue violence to its terms. The references to stages in the consent did not refer to earthworks and even if it did, the judge did not think that it was acceptable to read down condition 9 so as to refer only to each stage because it used the phrase '[a] complete set of engineering drawings' and does not refer to stages, whereas other conditions referred to engineering plans for particular stages. Despite being engineering works, they were carried out before a complete set of engineering drawings were approved and could not be relied upon to evidence physical commencement of the consent.

QUEENSLAND

Xstrata Coal Queensland Pty Ltd and Ors v Friends of the Earth-Brisbane Co-Op Ltd and Ors, and Department of Environment and Resource Management [2012] QLC 013

by Dr Justine Bell

Background

The applicants had applied for three mining leases and a related environmental authority to operate an open-cut coal mine west of Wandoan. The proposal involved mining activities at a rate of 30metric tonnes ('Mt') per annum for 35 years, plus associated infrastructure.

The proposal was declared to be a 'significant project' under the *State Development and Public Works Organisation Act 1971* (Qld). It was also declared to be a 'controlled action' under the EPBC Act. It was assessed by the Queensland Coordinator-General, who ultimately recommended that the project be approved, subject to conditions. It was subsequently approved by the Commonwealth minister, and a draft environmental authority was prepared incorporating the recommended conditions.

Under s 268 of the *Mineral Resources Act 1989* (Qld) ('MRA'), the Land Court is required to hear applications for a mining lease and any objections thereto. The Land Court is then required to make a recommendation as to whether the application be granted, including any conditions (s 269). The Land Court is also required to hear any objections to the grant of the environmental authority, and make a recommendation as to whether it should be granted (*Environmental Protection Act1994* (Qld) ('EPA') ss 216–23).

There were two main categories of objections in the case. A group of neighbouring landholders made objections regarding the size of the mine, and its impact on their land. Objections were also made by the environmental group Friends of the Earth ('FoE') based on the climate change impacts of the proposal.

This case note briefly summarises the responses to the landholders' objections, but focuses mainly on the climate change issues. There were also a number of issues dealt with by the Court, which will not be addressed.

Landholders' objections

The majority of the landholders' objections were dismissed, including that:

- the draft environmental authority ('EA') was released prior to the Commonwealth minister deciding whether to approve the controlled action; the Court held that there was nothing in the relevant legislation which required the administering authority to defer issuing a draft EA (mining lease) until after the Commonwealth minister had made a decision
- the applicant had not given valid reasons why a mining lease should be granted in respect of the area and shape of the land described in the lease. The applicant had applied for the mining lease to cover additional land to create a buffer zone between mining activities and other land. The Court held that, as a matter of construction of the MRA, the area of a mining lease could include an environmental buffer
- the objectors said that only about 11 000ha of the total area of 32 000ha originally applied for would be used for mining operations, which would adversely impact on food production. The Court held that the applicant had given good reasons for requiring the land

- the applicants intended to undertake grazing activities to maximize the productive use of the land. The Court held that this was permissible, as they would be carrying out those activities as landholders.

The Court upheld several of the landholders' objections, including the following:

- several areas requested in the application would not be used for mining. The court held that a mining lease should not be granted over those areas for the purpose of mining coal. Rather, pursuant to s 234(1)(b) of the MRA, the purpose for which the lease was granted over those areas should be limited to infrastructure purposes associated with the mining activities on the remaining MLA areas
- several of the respondents asserted that the application did not properly identify which areas of their land were classed as restricted land. The Court held that the applicants had not identified restricted land, but this was not a sufficient reason to recommend against granting the leases.

Climate change issues

The applicants addressed GHG emissions in the environmental impact statement ('EIS') in accordance with the *Greenhouse Gas Protocol.* This protocol distinguished between three types of emissions:

- scope 1 emissions: direct GHG emissions
- scope 2 emissions: indirect GHG emissions from the generation of purchased electricity
- scope 3 emissions: all other indirect GHG emissions resulting from a company's activities.

The applicants calculated all types of emissions in their EIS. They estimated that, over the life of the mine, scope 1 and 2 emissions would amount to 17.7MT of carbon-dioxide ('CO2'), and scope 3 emissions would amount to 1.32Gt of CO2. The total CO2 emissions would be 1.33Gt, of which 99% would result from the burning of coal by third parties. The applicants noted that companies are not responsible for scope 3 emissions under either Commonwealth or international law, and argued that those emissions are not materially relevant in either the Australian or international context.

FoE lodged objections under both the MRA and the EPA. FoE contended that the Court should recommend refusal of the project because:

- scope 3 emissions from the mine must be considered when assessing its impact under the MRA and the EPA
- the public right and interest was prejudiced due to the contribution the mine would make to climate change and ocean acidification
- the mine was not consistent with the principles of ecologically sustainable development ('ESD') set out in the *National Strategy for Ecologically Sustainable Development*.

The applicants argued that:

- stopping the project would not affect the amount of GHG emissions in the atmosphere. If the project was stopped, the coal that it would have produced would be replaced by coal produced elsewhere which would produce the same or a higher amount of GHG emissions when burned
- the mining and burning of coal from the project would have negligible or no separate impact on climate change and ocean acidification and, balancing any impacts against the benefits of the project, it should be permitted to proceed;
- even if it was considered appropriate to embark upon a consideration of matters of policy, it was not the policy of the state or Commonwealth Governments to act as the FoE suggested. That would be contrary to the policy agenda in this country.

Findings in relation to the Mineral Resources Act

Under the MRA, the Land Court is required to take into account and consider whether:

- the operations to be carried on under the authority of the proposed mining lease would conform with sound land use management
- there would be any adverse environmental impact caused by those operations and, if so, the extent thereof
- the public right and interest would be prejudiced
- any good reason had been shown for a refusal to grant the mining lease.

Section 269(4)(j): any adverse environmental impact caused by those operations and the extent thereof

FoE argued that the Court should interpret 'all adverse environmental impacts' to include downstream impacts,

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

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

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

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

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

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

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

Findings in relation to the Environmental Protection Act

FoE contended that:

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

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

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

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

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

Conclusion

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

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

VICTORIA

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

by Barnaby McIlrath

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