

# Land and Environment Court

## New South Wales

<b>Medium Neutral Citation:</b>	<b>Hunter Environment Lobby Inc v Minister for Planning (No 2) [2012] NSWLEC 40</b>
<b>Hearing dates:</b>	13 March 2012
<b>Decision date:</b>	13 March 2012
<b>Jurisdiction:</b>	Class 1
<b>Before:</b>	Pain J
<b>Decision:</b>	The conditions in relation to greenhouse gas emissions imposed by the Minister are appropriate.
<b>Catchwords:</b>	APPEAL - Class 1 appeal of major project - whether conditions requiring offsetting of scope 1 greenhouse gases should be imposed - application of recent Commonwealth legislation directed to reduction of greenhouse gases
<b>Legislation Cited:</b>	Carbon Credits (Carbon Farming Initiative) Act 2011 (Cth) Clean Energy Act 2011 (Cth) s 30 Constitution s 109 Judiciary Act 1903 (Cth) National Greenhouse and Energy Reporting Act 2007 (Cth)
<b>Cases Cited:</b>	Hunter Environment Lobby Inc v Minister for Planning [2011] NSWLEC 221 Newbury District Council v Secretary of State for Environment [1981] AC 578; [1980] 1 All ER 731
<b>Category:</b>	Principal judgment
<b>Parties:</b>	Hunter Environment Lobby Inc (Applicant) Minister for Planning (First Respondent) Ulan Coal Mines Ltd (Second Respondent)
<b>Representation:</b>	Mr P Clay SC (Applicant) Ms L McAndrew (S) (First Respondent) Mr A Galasso SC with Mr R Beasley SC (Second Respondent) Environmental Defender's Office Ltd (Applicant) Department of Planning, Legal Services (First Respondent)

**File Number(s):** 10998 of 2010

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## **EX TEMPORE JUDGMENT**

- 1 In *Hunter Environment Lobby Inc v Minister for Planning* [2011] NSWLEC 221 ( *HEL (No 1)* ) I stated that I would grant approval to Ulan's major project application MP\_08\_0184 for the extension of its coal mine near Mudgee for 20 years from 10 years subject to further consideration of specific conditions of consent in relation to groundwater, scope 1 greenhouse gas (GHG) emissions and biodiversity offset provisions. The only remaining issue is whether the Court should impose the scope 1 GHG conditions 18A - 18E proposed by the Applicant. Once again I thank Commissioner Pearson for her assistance.
- 2 Conditions 18A - 18E are as follows:
  - 18A. While the project is in operation, the Proponent must submit for approval, by 31 August each year, a report to the Director-General on the Scope 1, 2 and 3 greenhouse gas emissions associated with the project over the preceding financial year, including an assessment of the efficacy of the minimisation and mitigation actions described in the Air Quality and Greenhouse Gas Management Plan.
  - 18B. If the report at condition 18A indicates that the total emissions budget, as estimated for the Environmental Assessment for the project, will be exceeded, the proponent shall be required to mitigate the additional emissions.
  - 18C. The Proponent must purchase and surrender Australian Carbon Credit Units (ACCUs), to offset the Scope 1 greenhouse gas emissions associated with the project, as identified in the report provided to the Director-General under condition 18A. The Proponent must acquire the offsets within one month of the approval of the report under condition 18A.
  - 18D. The Proponent must provide documentation, to the satisfaction of the Director-General, to demonstrate compliance with condition 18B and 18C. This documentation must be provided within two months of providing the report under condition 18A.
  - 18E. Where a financial or regulatory liability has been imposed under another law (of any jurisdiction) in relation to scope 1 emissions, the Director-General may suspend compliance with the requirement to offset the scope 1 emissions under conditions 18A-D to the extent that those emissions are covered by that financial or regulatory instrument. The suspension shall operate only for the period that such a law is in force and continues to cover the relevant scope 1 emissions. The Director-General must be satisfied that the financial or regulatory liability is appropriate having regard to ecologically sustainable development and the risks posed by climate change.
- 3 Since judgment was delivered last year the Commonwealth Government has passed a package of greenhouse gas legislation which includes the *Clean Energy Act* 2011 (Cth) (the CE Act). The CE Act comes into force on 1 July

2012. Whether the conditions proposed can be imposed at all legally because of possible conflict with the Commonwealth scheme and therefore with s 109 of the Australian Constitution has been identified as an issue. Rather than proceeding with a *Judiciary Act* 1903 (Cth) notification process to State and Commonwealth Attorneys-General on a constitutional law question it appeared more efficient to dispose of the matter, if possible, if the parties considered the practical impacts of the Commonwealth scheme to determine practically as a merit matter whether the Court should impose the conditions sought.

- 4 I note that in the project approval granted on 15 November 2010 the Minister did impose provisions relating to reporting and mitigation of GHG in conditions 18 and 22 and in appendix 9 section 6.13. These are less onerous than those proposed by the Applicant.
- 5 Mr Blyth, energy specialist, for Ulan, and Mr Macintosh, climate law specialist, for the Applicant, prepared affidavits attaching experts' reports and met in joint conference to determine the application of the Commonwealth scheme to Ulan's operations. A joint experts' report dated 9 March 2012 was filed in Court. Mr Macintosh affirmed two affidavits both dated 13 February 2012. Mr Blyth affirmed an affidavit dated 6 March 2012. While there is some difference in terminology there was general agreement about the application of most aspects of the Commonwealth scheme. Entities such as Ulan are covered by the CE Act and Ulan already reports under the National Greenhouse and Energy Reporting Scheme (NGERS). Under the CE Act, during the fixed charge period (1 July 2012 to 30 June 2015) entities which emit more than 25,000 tonnes per year of "covered emissions" of scope 1 GHG emissions as defined in s 30 of the CE Act will be required to surrender carbon units to cover their liability under the scheme. If the emissions are less than that threshold they will not be so required, although they continue to be subject to the CE Act so that they remain covered by it. Fuel-related GHG emissions are dealt with under the Fuel Tax System. From 1 July 2015 the scheme will transition from a fixed price per carbon unit to a cap-and-trade emissions trading scheme.
- 6 The only processes resulting in the emission of scope 1 GHG by Ulan not covered under the Commonwealth scheme because there is no methodology to measure them (Mr Blyth's report section 4 at par 4.2 - 4.5), are slow oxidation and spontaneous combustion (comprising 2 per cent of Ulan's GHG emissions). Ulan submitted without dispute that 98 per cent of scope 1 GHG emissions are covered under the Commonwealth legislation when these processes are considered.
- 7 Mr Blyth's report in Table 2 and Table 3 provided estimates of GHG emissions based on the Environment Assessment production figures and more recent updated production figures provided to him by Ulan, respectively. These

tables showed that towards the end of the mine life the 25,000 tonne threshold would not be exceeded in some years. This resulted in agreement that, if the percentage of GHG not covered in Table 2 is added to the above 2 per cent figure, approximately 11 per cent of all GHG emissions would not require measures to be taken under the CE Act. If a percentage based on Table 3 is applied this figure is 4 per cent.

- 8 The experts also agreed that there are no Australian carbon credit units (that is, units issued under the *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth)) (ACCUs) in place, and the market is yet to emerge. Mr Macintosh recommended that Gold Standard Certified Emissions Reductions should be used instead.

### ***Applicant's submissions***

- 9 There remain scope 1 GHG emissions which will not be addressed by the Commonwealth scheme and these should be subject to measures requiring offsetting for the reasons identified in *HEL (No 1)* given the evidence of Professor Jones.
- 10 Ulan's liability to take additional offsetting measures does not arise for at least 10 years based on either Table 2 or 3 of Mr Blyth's report and the market for ACCUs is very likely to be developed by that time.

### ***Ulan's submissions***

- 11 The condition is unnecessary as the Commonwealth legislation is a complete national response to Australia's obligations under international conventions and protocols concerning climate change. The GHG emissions not covered by the Commonwealth scheme are de minimis. The Commonwealth Government selected a threshold of 25,000 tonnes for rational reasons explained in Mr Blyth's report in section 5. Further the Commonwealth Government intends to impose alternative mitigation measures for those emissions not covered. See point of clarification in the joint experts report at p 2.
- 12 The condition is unlawful applying the test in *Newbury District Council v Secretary of State for Environment* [1981] AC 578; [1980] 1 All ER 731, as submitted previously in the main proceedings. It would be illogical and unreasonable to impose a GHG offset condition given the object, scope and purpose of the CE Act.
- 13 There is uncertainty in proposed condition 18E concerning the Director-General's (DG's) role. There is uncertainty about whether and how the market developing for ACCUs. While the legal framework is in place when the market will be up and running is unknown.

## ***Minister's submissions***

- 14 Condition 18E is unworkable from the point of view of the DG. It requires the DG to assess greenhouse policy matters and assess coverage of other schemes applying the principles of ecologically sustainable development. The Department of Planning is not responsible for climate change policy. The condition imposes uncertain obligations on the DG.

## **Consideration**

- 15 The emission of GHG by Ulan at the mine near Mudgee contributes to a global problem which is now addressed in Australia through a national scheme passed by the Commonwealth Government, where that scheme does address emissions from individual large emitters of GHG. The scheme commences shortly on 1 July 2012. The experts' reports of Mr Blyth and Mr Macintosh identify the scope and purpose of the Commonwealth scheme and confirm that Ulan is subject to the Commonwealth scheme for most of its activities which result in scope 1 GHG emissions.
- 16 Accepting their evidence, I am satisfied that the scheme as represented in the CE Act, together with related legislation ( *Carbon Credits (Carbon Farming Initiative) Act 2011 (Cth)*; *National Greenhouse and Energy Reporting Act 2007 (Cth)*), meets at a practical level the purpose of imposing a condition requiring the offsetting of Scope 1 GHG emissions.
- 17 I therefore agree with the submissions of Ulan that the Applicant's proposed conditions 18A - 18E are unnecessary in light of the expert evidence outlined above concerning the practical aspects of applying the CE Act and related legislation to Ulan's operations near Mudgee. The scheme as presently conceived will not cover Ulan's scope 1 GHG emissions to a de minimis level only, particularly if Table 3 of Mr Blyth is considered as outlined above in par 7. I also consider there is an unsatisfactory level of uncertainty in relation to the development of the ACCUs market. Applying a practical outcomes approach to the assessment of the merits of the proposed GHG conditions of the Applicant in light of this evidence, I consider that the conditions are not warranted.
- 18 It is unnecessary that I resolve whether the Applicant's conditions satisfy the *Newbury* test.
- 19 I have not had to resolve whether there is a Constitutional conflict between the Commonwealth scheme and NSW environmental protection laws and that question must wait for another day.

- 20 I note that in different circumstances the DG could be required to make an assessment of the impacts of schemes relating to GHG emissions as such an assessment may arise in the conduct of the responsibilities of the Department of Planning for regulating environmental impacts of development, which may include GHG.
- 21 The conditions in relation to GHG emissions imposed by the Minister are appropriate.

[Annexure A - Conditions of approval](#) (PDF- 3mb)

## **Amendments**

13 April 2012 - added Annexure A - Conditions of approval

Amended paragraphs: annexure

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Decision last updated: 13 April 2012