CLIFFORD
CHANCE

Briefing note May 2013

# Striking the balance – when an offsets package is not enough

A court in New South Wales, Australia, has overturned approval for a mine extension, a decision that challenges the decision making process by government and highlights the complex issues raised by mine activities and the "triple bottom line" approach to sustainable development principles.

On 15 April 2013, the Land and Environment Court of New South Wales, in *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited* [2013] NSWLEC 48, upheld an appeal against the Minister's decision to approve the extension of Warkworth Mining Limited's operations in the Hunter Valley.

## Key issues

- The Land and Environment Court of New South Wales has overturned a Minister's decision to approve a mine extension
- The court gave a different weight to the various reports to that of the Minister leading to the decision to refuse the mine extension and uphold the appeal
- The decision has been appealed to the Supreme Court of New South Wales and will be heard from 30 July to 1 August 2013.

The court's decision has created considerable controversy. Warkworth launched an appeal to the New South Wales Supreme Court within days of the decision and the New South Wales government has also appealed, supporting Warkworth's position. A synopsis of the Land and Environment Court's decision is set out below.

**Background**

Warkworth Mining Limited, a Rio Tinto group company, operates an open cut coal mine in the Hunter Valley in New South Wales, a few kilometres north-east of Bulga. Mining at Warkworth began in 1981 and is permitted to continue until 2021. In 2010, Warkworth lodged an application under the now-repealed Part 3A of the *Environment Planning and Assessment Act 1979* (NSW) (the EPA Act) to extend the mine's life to 2031. The extension would require the closure of a road, clearing of endangered ecological communities, the removal of a significant local landform, and emplacement of overburden.

On 3 February 2012, the NSW Minister for Planning and Infrastructure conditionally approved the application. The conditions included a requirement for Warkworth to provide biodiversity offsets to compensate for the impacts of the mine extension on biological diversity and the endangered ecological communities.

**Appeal to the Land and Environment Court**

The residents of Bulga, through the Bulga Milbrodale Progress Association Inc, appealed to the Land and Environment Court against the

Minister's decision to approve the mine extension.

The appeal to the court was a "merits review", with the court having "the functions and discretions" of the Minister to determine whether to approve or disapprove the application for the mine extension. On 15 April 2013, Preston CJ determined that the application for the mine extension should be refused having regard to the significant adverse impacts on biological diversity, noise impacts, dust emissions and adverse social impacts. In balancing these significant adverse environmental and social impacts against the material economic and social benefits of the mine extension, Preston CJ considered that the extension was not justified on environmental, social and economic grounds.

**Impacts of the proposed expansion**

One of the objects of the EPA Act is to encourage ecologically sustainable development (ESD). In *Hunter Environmental Lobby Inc v Minister for Planning* [2011] NSWLEC 221, Pain J held that as the principles of ESD are an aspect of public interest, they are relevant considerations in a merits review proceeding. Similarly, Preston CJ, at paragraph 59 of his decision, stated that "…it is sufficient to conclude that as an aspect of the public interest [the principles of ESD] may be taken into account in cases where issues relevant to the principles of ESD arise".

Preston CJ considered the impacts of the proposed mine extension in turn.

**Impacts on biological diversity**

The mine's extension would involve clearing a number of vegetation communities listed as endangered ecological communities (EEC) under the *Threatened Species Conservation Act 1995* (NSW). For example, the mine extension would result in the clearing and open cut mining of 106.7 hectares of Warkworth Sands Woodland. This would amount to a loss of 23 per cent of this vegetation community, described by Preston CJ at paragraph 125 of his judgment, as a "significant" loss.

Preston CJ, at paragraph 153, found that Warkworth had "proposed no avoidance measures and little mitigation measures to reduce the scale and intensity of the significant impacts on biological diversity particularly on the affected EEC". Instead, Warkworth had proposed an "offsets package to compensate for the significant residual impacts" of the mine extension.

The offsets package proposed by Warkworth comprised of both direct offsets and other compensatory measures. The direct offsets proposed were the conservation of seven areas of existing vegetation communities and the rehabilitation of mined lands. Warkworth also proposed to contribute to a research programme, to prepare a recovery plan for the vegetation communities, to rehabilitate an old quarry and to fund research into rehabilitation of a plant species as compensatory measures.

At paragraph 202 of his judgment, Preston CJ held that this offsets package:

- did "not adequately compensate for the Project's significant impacts on the affected EECs"
- that the direct offsets "would not provide sufficient, measurable conservation gain for the particular components of biological diversity impacted by the Project, particularly the affected EECs"
- that the compensation measures "would not add sufficient benefits to achieve an overall conservation outcome of improving or maintaining the viability of the affected EECs".

**Noise and dust impacts**

Preston CJ found that the noise impacts of the mine extension on the residents of Bulga were likely to be "significant, intrusive and reduce amenity". The noise mitigation strategies (for example, double glazing and air-conditioning) proposed by Warkworth were not likely to reduce noise levels to levels that would have an acceptable impact on the residents. He also concluded, at paragraph 403, that "no confident conclusion can be reached that the air quality impacts of the Project will be acceptable in practice".

**Social impacts**

Preston CJ considered both the positive and negative social impacts of the mine extension, with the court hearing evidence from two experts and the residents of Bulga. He also considered the social impacts from adverse noise and dust impacts, adverse visual impacts and adverse change in the composition of the community. He noted that there would be some positive social impacts from the mine extension, particularly with continuing employment. However, on balance, he found that negative social impacts were likely with adverse noise, visual impacts and adverse impacts from the change in composition of the community.

**Economic issues**

Preston CJ was not satisfied that the economic analyses presented by

Warkworth supported the conclusion that the economic benefits of the mine extension would outweigh the environmental, social and other costs. He considered that the analyses were deficient and did not consider all of the relevant matters that need to be considered by an approval authority such as the Minister.

Preston CJ also referred to the "polycentricity" of the issues involved in determining whether to approve or disapprove a mining project. One of the analyses involved respondents making choices separately and sequentially, with no consideration of the impact of one choice on the other issues. He did not approve of this approach and noted, at paragraph 483, that the issues "cannot be resolved by identifying each issue and sequentially resolving it; the resolution of one issue has repercussions on the other issues".

Issues of equity or distributive justice were also considered by Preston CJ. His Honour considered that the benefit cost analysis and the non-market valuation study prepared for the original environmental assessment did not have regard to issues of distributive justice (being the just distribution of the benefits and burdens of economic activity). Specifically, the analyses did not have adequate regard to the entities who would be assuming burdens, being the residents of Bulga, the broader community and the EECs. Further, the analyses did not consider the principles of ESD, inter-generational equity and intra-generational equity, regarding the entities who would be assuming burdens.

**Balancing of the factors**

Preston CJ determined that, balancing all relevant matters, the preferable decision was to disapprove the mine extension. He stated at paragraph 498:

*"I have found, amongst other things, that the Project would have significant and unacceptable impacts on biological diversity, including on endangered ecological communities, noise impacts and social impacts; that the proposed conditions of approval are inadequate in terms of the performance criteria set and the mitigation strategies required to enable the Project to achieve satisfactory levels of impact on the environment, including the residents and community of Bulga; and that the proposed conditions of approval, including by combining the Warkworth mine with the Mount Thorley mine, are likely to make monitoring and enforcing of compliance difficult, thereby raising the possibility that the Project's impacts may be greater and more adverse than allowed by the conditions of approval".*

**Appeal to the Supreme Court**

Pursuant to section 57 of the *Land and Environment Court Act 1979* (NSW), a decision of a Judge in Class 1 proceedings may be appealed to the Supreme Court of New South Wales on a question of law only (the proceedings in this case fell under the Class 1 jurisdiction of the court). As noted above, Warkworth has appealed the court's decision and the Supreme Court has granted Warkworth's application to expedite the appeal, which will be heard from 30 July to 1 August 2013.

In public statements, Rio Tinto has said that the Court overturned the Minister's decision because "it disagreed with the outcome of a rigorous planning process that had determined the project was in the overall public interest" and that the court failed to give the proper weight to expert reports prepared for the Department of Planning and Infrastructure ("Minister joins Rio in mine appeal", The Australian, 13 May 2013). The Minister's appeal, lodged on 10 May 2013, argues that the Court has not properly considered the public interest as outlined in the same reports.

Preston CJ appeared to foreshadow these issues in his judgment noting, at paragraph 27, "[w]here there is a range of decisions reasonably open and all of those would be correct, the Court chooses, on the evidence before it, what it considers to be the preferable decision".

So once again, a balance must be struck and the Supreme Court will be asked to consider whether the Land and Environment Court has tipped the scales too far. There will be little direct impact on most companies operating in New South Wales in the short term, particularly as the provisions of the EPA Act at issue in this case are no longer in force. It is possible that processing of current applications under the EPA Act will be slowed a little pending the outcome of the appeal. However, the real impact will flow from the Supreme Court's decision and what comments that Court might make on the role of the Land and Environment Court in merits review cases and how to balance the positive and negative impacts of mining development on the natural environment and the human community that inhabits it.

## Contacts

**Jon Carson**
Partner, Perth
T: +61 8 9262 5510
E: jon.carson@cliffordchance.com

**Richard Graham**
Partner, Sydney
T: +61 2 8922 8017
E: richard.graham@cliffordchance.com

**Robyn Glindemann**
Counsel, Perth
T: +61 8 9262 5558
E: robyn.glindemann@cliffordchance.com

**Elizabeth Dowson**
Associate, Perth
T: +61 8 9262 5529
E: elizabeth.dowson@cliffordchance.com



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Clifford Chance, Level 7, 190 St Georges Terrace, Perth, WA 6000, Australia
Clifford Chance, Level 16, No.1 O'Connell Street, Sydney, NSW 2000, Australia