return to AMPLA 2006 Table of Contents

Mining in Greenhouses: A Precautionary Tale

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SUMMARY

This paper examines the precautionary principle and its adoption into the planning and environmental approval process. The principle, which can lead to the shifting of an evidentiary burden of proof, has a number of elements which are discussed in the context of recent case law. The paper concludes that, where there is relative certainty in a project proposal as to who the end user of product is and what the end use may be, the greenhouse emissions associated with the project proposed will be an increasingly relevant matter for consideration in environment and planning courts and tribunals.

INTRODUCTION

> "If individual members of the judiciary each work towards a common goal of achieving an environmentally sustainable future, the law on sustainable development will gain strength and through collective effort the goal will be reached. To use a phrase of Victor Hugo's, 'there is one thing more powerful than all the armies in the world and that is an idea whose time has come'. It is clear that the time for sustainable development has come, and it is essential that individual judges and national judiciaries seize the opportunity."[1]

Assessing the environmental impact of large scale mining and infrastructure projects is an increasingly complex and rigorous process for both project proponents and consent authorities alike. Recent Australian case law illustrates the growing weight a comprehensive environmental assessment will be given in respect to the approvals process as a whole and also highlights the increasing public and judicial scrutiny given to the adequacy of an assessment of the environmental impacts of a project or development.

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[1] B Preston, "Judicial Implementation of the Principle of Ecologically Sustainable Development in Australia and Asia", paper presented to the Law Society of New South Wales Regional Presidents Meeting, Sydney, NSW, 21 July 2006.

Arguably the single biggest environmental concern today is that of climate change and the effect of global warming caused by the emission of greenhouse gases. Whether or not, or even the degree to which, greenhouse emissions are responsible for global warming remains a topic of scientific debate. Notwithstanding the existence of uncertainty as to the cause and effect of global warming however, proponents of projects or developments that may be responsible for producing greenhouse emissions (including electricity generators that rely on fossil fuels, oil and gas projects and coal mines), may be required when undertaking an environmental impact assessment to address the impact of greenhouse gas emissions on the environment. Such an assessment may include an assessment of the impact of the greenhouse emissions produced by third parties or end-users.

This observation is borne out by two recent cases: first, the case of *Telstra Corp Ltd v Hornsby Shire Council*[2] (*Telstra v Hornsby SC*), where the Chief Justice of the New South Wales Land and Environment Court, Preston CJ, provided a detailed summary of the principles of ecologically sustainable development (ESD), in particular the precautionary principle, and how those principles can be implemented; and secondly, the Federal Court decision of *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment & Heritage & Ors*[3] (the *Isaac Plains* case), where the question was considered of whether greenhouse emissions produced by two coal mining projects had to be taken into account under *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (the EPBC Act) referrals. This paper discusses these two recent cases and also the 2004 *Hazelwood Power Station* case[4] and attempts to assess the impact those decisions may have in respect of planning and environmental approvals where greenhouse emissions may be produced by the project or development.

Telstra v Hornsby SC

In this case, the Chief Justice of the Court, Preston CJ, summarised the principles of ESD, in particular, the precautionary principle.[5] While the case is of particular interest to proponents of projects in New South Wales in that it provides an indication of the current approach of the New South Wales Land and Environment Court, it is also of interest to project proponents in other Australian jurisdictions where planning and environmental laws embody the principles of

[2] [2006] NSWLEC 133.

[3] [2006] FCA 736.

[4] *Australian Conservation Foundation & Ors v Latrobe City Council & Ors* [2004] VCAT 2029.

[5] The "precautionary principle" is derived from a German law principle (known as Vorsorgeprinzip). It requires precautionary measures to be taken in respect of certain activities that may result in environmental damage, notwithstanding that the cause of effect of the damage has not been scientifically proven. Put another way, it requires action to be taken now to avoid possible environmental damage when the scientific evidence for acting is inconclusive but the potential damage could be significant or irreversible.

ESD and the precautionary principle and require decision-makers to have regard to those principles when making their determinations.[6]

Background

The case related to an appeal by Telstra against a decision of the Hornsby Shire Council not to allow Telstra to erect two antennas on the clubhouse roof of the Cheltenham Recreation Club. During the Council's assessment of Telstra's application a number of community concerns were raised, including a concern that "the proposed facility will emit electromagnetic energy that will harm the residents of Cheltenham".[7] Justice Preston ultimately upheld the appeal and granted development consent to Telstra, observing that "the community's perceptions of an adverse impact on the health and safety of residents and the environment by exposure to electronic transmissions were unjustified in objective, observable, likely consequences".[8]

Preston CJ noted that while a number of decisions of the New South Wales Land and Environment Court have established that the precautionary principle is to be taken into consideration when development applications under the *Environmental Planning and Assessment Act 1979* (NSW) (the EPA Act) are being considered, "there has not yet been, in the decisions of this Court, a detailed explanation of the precautionary principle or the procedure for the application of it."[9] His Honour went on to provide guidance on the concept of the precautionary principle and its application, drawing upon academic literature and judicial decisions in other jurisdictions.

The Principles of ESD and the New Souh Wales Legislative Framework

There are essentially four principles of ESD.[10]

[6] Approximately 63 pieces of Commonwealth, State and Territory planning and environmental legislation embody the principles of ESD. See eg the following: Commonwealth: EPBC Act; Victoria: *Environment Protection Act 1970*; Queensland: *Environmental Protection Act 1994*; *Integrated Planning Act 1997*; *Water Act 2000*; Western Australia: *Environmental Protection Act 1986*; *Conservation and Land Management Act 1984*; *Rights in Water and Irrigation Act 1914*; South Australia: *Environment Protection Act 1993*; *Development Act 1993*; *Natural Resources Management Act 2004*; Tasmania: *Nature Conservation Act 2002*; *National Parks and Reserves Management Act 2002*; Northern Territory: *Waste Management and Pollution Control Act*; Australian Capital Territory: *Environment Protection Act 1997*; *Land (Planning and Environment) Act 1991*.

[7] [2006] NSWLEC 133 [6].

[8] [2006] NSWLEC 133 [196].

[9] [2006] NSWLEC 133 [127].

[10] A more detailed description of the principles of ESD can be found in the Intergovernmental Agreement on the Environment between the governments of the Commonwealth of Australia and each of the Australian States and Territories.

1. The precautionary principle, discussed in greater detail below.
2. Intergenerational equity: the concept that the present generation should ensure that health, diversity and productivity are maintained or enhanced for the benefit of future generations.
3. Conservation and biological diversity and ecological integrity.
4. Internalisation of environmental costs, which requires accounting for both the short-term and long-term external environmental costs.

These four principles should be viewed as a package. When considering ESD, no single principle should be considered in isolation or given greater weight than the other principles.

The principles of ESD are set out in s 6(2) of the *Protection of the Environment Administration Act 1991* (NSW) (the POEA Act).[11] The EPA Act expressly provides in s 5(a)(vii) that the objects of the EPA Act is to encourage ESD. The principles of ESD set out in s 6(2) of the POEA Act are adopted by s 4(1) of the EPA Act.

Section 79C(1) of the EPA Act sets out matters that a consent authority must take into consideration when assessing a development application under Pt 4 of that Act. While s 79C(1) does not expressly refer to ESD, it does require the "public interest" to be taken into account:

> "The consideration of the public interest is ample enough, having regard to the subject matter, scope and purpose of the EPA Act, to embrace ecologically sustainable development. Accordingly, by requiring a consent authority (or on a merits review appeal to the Court) to have regard to the public interest, s 79C(1)(e) of the EPA Act obliges the consent authority to have regard to the principles of ecologically sustainable development in cases where issues relevant to the principles arise."[12]

The requirement in s 79C(1) to consider the public interest only applies to decisions made under Pt 4 of the EPA Act. This requirement is not replicated in other parts of the Act (for example, Pt 3A which deals with the assessment of major projects).

[11] In respect of the precautionary principle, s 6.2(a) relevantly provides: "… Ecologically sustainable development can be achieved through the implementation of the following principles and programs: (a) the precautionary principle – namely, that if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. In the application of the precautionary principle, public and private decisions should be guided by: (i) careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment, and (ii) an assessment of the risk-weighted consequences of various options."

[12] [2006] NSWLEC 133 [123].

Application of the Precautionary Principle

The 10 points below summarise the application of the precautionary principle as set out by Preston CJ in his judgment.

1. **Conditions precedent**

   Before the precautionary principle will apply, two conditions precedent must be satisfied. The first is a threat of "serious or irreversible environmental damage".[13] The second is "scientific uncertainty as to the environmental damage."[14] These conditions precedent are cumulative and both must be satisfied. If the first condition precedent is not satisfied (that is, if there is no threat of serious or irreversible environmental damage), the precautionary principle will not apply.

2. **Condition precedent 1 – threat of serious or irreversible environmental damage**

   In respect of the first condition precedent, two points should be noted: first, the environmental damage need not have actually occurred, it is sufficient that it is *threatened*; and secondly, the threatened damage must be *serious or irreversible*:

   (a) when determining the threat of damage to the environment, "direct and indirect threats, secondary and long-term threats and the incremental or cumulative impacts of multiple or repeated actions or decisions"[15] should be considered. Further, "the threat of the damage must be adequately sustained by scientific evidence";[16]

   (b) in assessing the seriousness or irreversibility of environmental damage, included in the many factors that might be considered are the following:

      (i) "the spatial scale of the threat (eg, local, regional, statewide, national, international);

      (ii) the magnitude of possible impacts, on both natural and human systems;

      (iii) the perceived value of the threatened environment;

      (iv) the temporal scale of possible impacts, in terms of both the timing and the longevity (or persistence) of the impacts;

      (v) the complexity and connectivity of the possible impacts;

      (vi) the manageability of possible impacts, having regard to the availability of means and the acceptability of means;

      (vii) the level of public concern, and the rationality of and scientific or other evidentiary basis for the public concern; and

      (viii) the reversibility of the possible impacts and, if reversible, the time frame for reversing the impacts, and the difficulty and expense of reversing the impacts."[17]

[13] [2006] NSWLEC 133 [128].
[14] [2006] NSWLEC 133 [128].
[15] [2006] NSWLEC 133 [130].
[16] [2006] NSWLEC 133 [134].
[17] [2006] NSWLEC 133 [131].

3. **Condition precedent 2 – scientific uncertainty**

The second condition precedent required to be satisfied to trigger the application of the precautionary principle is that there be "a lack of full scientific certainty" as to the nature and scope of the threat of environmental damage. While the threat requires something less than absolute scientific certainty, it requires something more than mere speculation or hypothecation. A "lack of full scientific certainty" does require a minimum threshold level. That is, there must be some evidence to suggest the threat of environmental damage exists.

A suggested threshold test is one of "reasonable scientific plausibility". Reasonable scientific plausibility may exist "when empirical scientific data (as opposed to simple hypothesis, speculation, or intuition) make it reasonable to envisage a scenario, even if it does not enjoy unanimous scientific support".[18] As to when there may be reasonable scientific plausibility: that may be when "risk begins to represent a minimum degree of certainty, supported by repeated experience. But a purely theoretical risk may also satisfy this condition, as soon as it becomes scientifically credible: that is, it arises from a hypothesis formulated with methodological rigour and wins the support of part of the scientific community, albeit a minority".[19]

An inverse relationship may exist between the level or degree of potential environmental damage and the level or degree of scientific uncertainty about the nature and scope of the threat of damage:

> "where the relevant degree or magnitude of potential environmental damage is greater, the degree of certainty about the threat is lower… for a formulation of the precautionary principle which uses the threshold of 'serious or irreversible' environmental damage, the correlative degree of certainty about the threat is 'highly uncertain threat'. This would contrast with a formulation of the precautionary principle which sets a lower degree of potential harm such as 'potential adverse effects', where the correlative degree of certainty about the threat would be higher, namely 'highly certain of threat'."[20]

If the second condition precedent is not satisfied but the first is (that is, although there is a threat of serious or irreversible environmental damage, there is no scientific uncertainty) the precautionary principle will not apply. Rather, preventative measures "to control or regulate the relatively certain threat of serious or irreversible environmental damage"[21] must be taken.

4. **Shifting the burden of proof**

If both of the conditions precedent outlined above are satisfied, the precautionary principle will be activated. At that point:

[18] [2006] NSWLEC 133 [148].
[19] [2006] NSWLEC 133 [148].
[20] [2006] NSWLEC 133 [146].
[21] [2006] NSWLEC 133 [149].

> "there is a shifting of an evidentiary burden or proof. A decision-maker must assume that the threat of serious or irreversible environmental damage is no longer uncertain but is a reality. The burden of showing that this threat does not in fact exist or is negligible effectively reverts to the proponent of the economic or other development plan, programme or project.
>
> The rationale for requiring this shift of the burden of proof is to ensure preventative anticipation; to act before scientific certainty of cause and effect is established. It may be too late, or too difficult and costly, to change a course of action once it is proven to be harmful. The preference is to prevent environmental damage, rather than remediate it. The benefit of the doubt is given to environmental harm, it is better to err on the side of caution.
>
> The function of the precautionary principle is, therefore, to require the decision-maker to assume that there is, or will be, a serious or irreversible threat of environmental damage and to take this into account, notwithstanding that there is a degree of scientific uncertainty about whether the threat really exists."[22]

5. **Threat of serious or irreversible damage is merely one factor to be considered**

Importantly, it must be remembered that the shifting the evidentiary burden of proof only operates in respect of the question of serious or irreversible environmental damage. It does not operate in respect of the decision-making process as a whole. As Preston CJ noted:

> "If a proponent of a plan, programme or project fails to discharge the burden to prove that there is no threat of serious or irreversible environmental damage, this does not necessarily mean that the plan, programme or project must be refused. It simply means that, in making the final decision, the decision-maker must assume that there will be serious or irreversible environmental damage. This assumed factor must be taken into account in the calculus which decision-makers are instructed to apply under environmental legislation (such as s 79C(1) of the EPA Act). There is nothing in the formulation of the precautionary principle which requires decision-makers to give the assumed factor (of serious or irreversible damage) overriding weight compared to the other factors required to be considered, such as social and economic factors, when deciding how to proceed."[23]

6. **Precautionary principle involves preventative anticipation**

The precautionary principle "permits the taking of preventative measures without having to wait until the threats become fully known".[24]

[22] [2006] NSWLEC 133 [150-152].
[23] [2006] NSWLEC 133 [154].
[24] [2006] NSWLEC 133 [156].

7. **Zero risk precautionary standard inappropriate**

"The precautionary principle should not be used to try to avoid all risks",[25] nor should it be used to exclude hypothetical or speculative risks. The precautionary principle is only appropriate "if the risk, although the reality and extent of the risk have not been fully demonstrated be conclusive scientific evidence, appears nevertheless to be adequately backed up by scientific data available at the time."[26]

8. **Degree of precaution required**

"The type and level of precautionary measures that will be appropriate will depend on the combined effect of the degree of seriousness and irreversibility of the threat and the degree of uncertainty. This involves assessment of risk in its usual formulation, namely the probability of the event occurring and the seriousness should it occur. The more significant and the more uncertain the threat, the greater the degree of precaution required".[27] Also, "it may be prudent to retain some margin for error, until all of the consequences of the decision to proceed with the development plan, programme or project are known".[28]

9. **Proportionality of response**

Any response to the threat of environmental damage must be proportionate. That is, measures should not go beyond what is appropriate and necessary in order to achieve the objectives in question. "In applying the precautionary principle, measures should be adopted that are proportionate to the potential threats. A reasonable balance must be struck between the stringency of the precautionary measures, which may have associated costs, such as financial, livelihood and opportunity costs, and the seriousness and irreversibility of the potential threat".[29]

In determining an appropriate response considerations of practicability, including cost, must be taken into account. "There must be proportionality of response or cost effectiveness of margins of error to show that the selected precautionary measure is not unduly costly."[30] The appropriateness of a precautionary measure to regulate potential environmental damage requires an assessment of the risk-weighted consequence of various options. "The available options to address the threat should be identified and the likely consequences of those options and of inaction should be addressed."[31]

> "The selection of the appropriate precautionary measures must involve examining both sides of the ledger: the costs associated with the project, process or product (which tends to increase the degree of precaution) as well

[25] [2006] NSWLEC 133 [157].
[26] [2006] NSWLEC 133 [159].
[27] [2006] NSWLEC 133 [161].
[28] [2006] NSWLEC 133 [162].
[29] [2006] NSWLEC 133 [167].
[30] [2006] NSWLEC 133 [170].
[31] [2006] NSWLEC 133 [172].

as the benefits of the project, process or product (which tends to decrease the degree of precaution commensurate with realising the benefit)."[32]

10. **Precautionary principle does not necessarily prohibit development**

"The precautionary principle, where triggered, does not necessarily prohibit the carrying out of a development plan, programme or project until full scientific certainty is attained".[33] If it did, "it would result in a paralysing bias in favour of the status quo and against taking precautions against risk."[34] "The solution is to assess the risk-weighted consequences of various options and select the option that affords the appropriate degree of precaution for the set of risks associated with the option."[35]

Determination – Application of the Principles to the Telstra Case

Preston CJ found that the first condition precedent for the application of the precautionary principle, a threat of serious or irreversible damage, was not satisfied. As such, there was no basis for the application of the precautionary principle in respect of Telstra's application and no basis for refusing consent to the proposed development.

The Isaac Plains Case

In the *Isaac Plains* case, the applicant sought to extend the application of the *Nathan Dams* case[36] by suggesting that the impacts that must be taken into consideration by the Minister when deciding if a project was a controlled action and therefore subject to the EPBC Act included the greenhouse gas emissions impact of mining, transportation and burning of coal.

Evidence lead in the case indicated that departmental officers advising the Minister's delegate and the Minister's delegate himself, did take into consideration greenhouse impacts when assessing referrals under the EPBC Act. The decision indicates that, notwithstanding that greenhouse gas emissions are not a specific trigger requiring approval under the EPBC Act, their impact is considered by the relevant decision-makers and as such, should be addressed in a referral by proponents of projects that may lead to the emission of greenhouse gases.

[32] [2006] NSWLEC 133 [177].
[33] [2006] NSWLEC 133 [179].
[34] [2006] NSWLEC 133 [180].
[35] [2006] NSWLEC 133 [181].
[36] *Minister for Environment and Heritage v Queensland Conservation Council Inc* (2004) 139 FCR 24. This case expanded the concept of what constitutes an environmental impact by requiring indirect impacts, including impacts caused by third parties, to be taken into consideration. This case and also the case of *Booth v Bosworth* (2001) FCR 39 were discussed in a paper by Damien Gardiner, "Mining in Greenhouses – Digging Deeper into Environmental Impact Assessment" [2005] *AMPLA Yearbook* 492.

Dowsett J distinguished this case from the *Nathan Dams* case primarily on the basis that he could not be satisfied that "the burning of coal at some unidentified place in the world, the production of greenhouse gases from such combustion, its contribution towards global warming and the impact of global warming upon a protected matter" can be described as an impact upon a protected matter.

Background

The Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc (the Applicant) brought proceedings under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) seeking a review of two decisions under s 75 of the EPBC Act by the delegate of the Minister for the Environment & Heritage (a Mr Flanigan). Both decisions related to coal mine proposals in Queensland: the first concerned a proposal by Bowen Central Coal Management Pty Ltd to develop a new coal mine near Moranbah (the Isaac Plains Project); the second concerned a proposal by QCOAL Pty Ltd to develop a new coal mine near Collinsville (the Sonoma Project).

In response to the Minister publishing the referrals on the internet and inviting comment, the Applicant made submissions in respect of both Projects on a number of grounds. One such ground was that consideration had to be given to greenhouse gas emissions from both the extraction process and the eventual burning of the extracted coal.

In respect of both projects, Mr Flanigan decided that neither was likely to have an impact on matters of national environmental significance which are protected by the EPBC Act.

The Applicant's Case

The Applicant sought a review on a number of grounds, including that Mr Flanigan failed to take account of the "adverse impacts the Isaac Plains Coal Project and the Sonoma Coal Project are likely to have on the matters protected by Part 3 of the EPBC Act due to mining, transport and use of coal from the mines emitting a large amount of greenhouse gases contributing to global warming".

The Applicant contended that the error was disclosed by the absence from Mr Flanigan's reasons of any detailed discussion of the greenhouse gas and climate change issues.

Evidence was lead as to the process and methodology adopted by Mr Flanigan in reaching his decision, including consideration of the submissions made by the Applicant. The evidence indicated that Mr Flanigan considered two classes of possible impact: "direct impacts"[37] and "indirect impacts". The indirect impacts

[37] The *direct impact* in the case of the Isaac Plains Project was the possible impact via the Isaac River, presumably as a result of pollution, and, in respect of the Sonoma Project, was the impact on water quality issues.

included the issue of greenhouse gas emission and climate change. In cross-examination Mr Flanigan agreed that "greenhouse gases would be emitted as a result of the mining operation itself. Apparently gases caught in the coal seam are released during mining. Other greenhouse gases would be emitted as a result of the transportation of the coal. Those emissions come from the means of transport rather than the coal. Burning of the coal will also produce greenhouse gases. Mr Flanigan said that he addressed all of those aspects. He considered that burning the coal would produce much greater greenhouse emission than would the mining process or transportation."[38]

Assertions are not enough

Dowsett J accepted the evidence of Mr Flanigan and accepted that Mr Flanigan had "considered the possible impact of greenhouse gases generated in the extraction, transportation and burning of coal won from each proposed mine and concluded that there was no significant impact for the purposes of Part 3".[39]

Of note, were the following comments from Dowsett J in respect of the connection between "action" and "impact":

> "I have proceeded upon the basis that greenhouse gas emissions consequent upon the burning of coal mined in one of these projects might arguably cause an impact upon a protected matter, which impact could be said to be an impact of the proposed action. I have adopted this approach because it appears to have been the approach adopted by Mr Flanigan. However I am far from satisfied that the burning of coal at some unidentified place in the world, the production of greenhouse gases from such combustion, its contribution towards global warming and the impact of global warming upon a protected matter, can be so described. The applicant's concern is the possibility that at some unspecified future time, protected matters in Australia will be adversely and significantly affected by climate change of unidentified magnitude, such climate change having been caused by levels of greenhouse gases (derived from all sources) in the atmosphere. There has been no suggestion that the mining, transportation or burning of coal from either proposed mine would directly affect any such protected matter, nor was there any attempt to identify the extent (if any) to which emissions from such mining, transportation and burning might aggravate the greenhouse gas problem. The applicant's case is really based upon the assertion that greenhouse gas emission is bad, and that the Australian government should do whatever it can to stop it including, one assumes, banning new coal mines in Australia. This case is far removed from the factual situation in Minister for Environment and Heritage v Queensland Conservation Council Inc (2004) 139 FCR 24."[40]

[38] [2006] FCA 736 [35].
[39] [2006] FCA 736 [44].
[40] [2006] FCA 736 [72].

Hazelwood Power Station Case

The *Hazelwood Power Station* case provides an interesting contrast to the *Isaac Plains* case. Here the Victorian Civil and Administrative Tribunal (Tribunal) found that a panel appointed to hear submissions about the environmental effects of a new coal mine project failed to comply with its duties under s 24[41] of the *Planning and Environment Act 1987* (the P&E Act) when it did not take into consideration submissions on the possible adverse environmental effect of greenhouse gas emissions produced as a result of *burning* of coal produced by the Hazelwood Power Station. This was so even though the Minister's terms of reference to the panel specifically directed the panel not to consider matters related to greenhouse gas emissions from the Hazelwood Power Station because these issues were being addressed through a separate process.

International Power Hazelwood (IPH) owned and operated a coal mine and power station in the Latrobe Valley. The coal mines which had been used to fuel the power station were not expected to produce a sufficient coal supply beyond the year 2009. IPH wished to develop an additional coal field to enable the power station to continue to operate until 2031 (the Project). A number of approvals were required to give effect to the Project, one of which was approval to amend provisions of the Latrobe Planning Scheme (the Amendment).

The Victorian Government required IPH to prepare an environmental effects statement (EES) in relation to the Project. The EES described and assessed the implications of the *mining* of the coal on greenhouse gas emissions, but it did not deal with the implications of the production of greenhouse gas emissions by the *burning* of coal, produced from the new coal field, at the power station. In preparing the EES, IPH had been informed by the Victorian Government that greenhouse emissions produced by the power station was outside the scope of the EES in respect of the new mine and would be dealt with separately by another process.

Having prepared the EES, a panel was constituted to inquire into the environmental effects of the Project.[42] The Minister for Planning approved the terms of reference for that panel. The terms of reference specifically directed the panel "not to consider matters related to greenhouse gas emissions from the Hazelwood Power Station – these issues are being addressed through a separate process".

Submissions were made to the panel from a number of stakeholders, including various environmental groups. The Australian Conservation Foundation and other environmental groups made submissions to the panel about the impact of greenhouse emissions that would be produced from the burning of coal won from

[41] Section 24 of the P&E Act deals with Panel Hearings and provides: "The panel must consider all submissions referred to it and give reasonable opportunity to be heard to – (a) any person who has made a submission referred to it; (b) the planning authority; (c) any responsible authority or municipal council concerned; … (e) any person whom the Minister or planning authority directs the panel to hear."

[42] The panel was constituted by the Minister for Planning under the P&E Act 1987 to consider submissions in relation to the Project.

the Project at the power station. These groups argued that it was "inappropriate to exclude the greenhouse implications of the proposal from the panel's deliberations".[43] Further these groups submitted that "it was relevant and important to consider greenhouse issues as part of the EES process before the panel made its independent recommendation to the planning authority under the P&E Act."[44]

The panel stated that it would not consider submissions or matters that were outside the terms of reference given to the panel by the Minister for Planning. In its application to the Tribunal, the applicants alleged that the panel failed to comply with various sections of the P&E Act, including s 27 of that Act which provides that a panel appointed to consider submissions about an amendments to a planning scheme (such as the Amendment) must consider all submissions referred to it and give a reasonable opportunity to be heard to any person who has made a submission referred to it.

The Tribunal held that the panel's obligation is to consider all relevant submissions to it, and whether a submission is relevant must be ascertained by reference to the provisions of the P&E Act and the content of the amendment in question. On the evidence before the Tribunal, the Tribunal was satisfied that the panel did not intend to consider submissions by the applicants "concerning the environmental effects of greenhouse gases generated by the continued use of the power station."[45]

Sections 6 and 4(1) of the P&E Act set out the potential scope of the planning scheme,[46] including any amendment to a planning scheme. Matters outside this scope "are not relevant considerations in the preparation, consideration, adoption or approval of the [A]mendment. Further a submission outside this scope must be disregarded."[47]

Morris J held that "a submission will be 'about an amendment', even if it relates to an *indirect* effect of the amendment, if there is a sufficient nexus between the

[43] [2004] VCAT 2029 [10].
[44] [2004] VCAT 2029 [11].
[45] [2004] VCAT 2029 [35].
[46] Section 6(1) provides: "A planning scheme for an area: (a) must seek to further the objectives of planning in Victoria within the area covered by the scheme; and (aa) must contain a municipal strategic statement, if the scheme applies to the whole or part of a municipal district; and (b) ma make any provision which relates to the use, development, protection or conservation of any land in the area."

Section 4(1) provides: "The objectives if planning in Victoria are: (a) to provide for the fair, orderly, economic and sustainable use, and development of land; (b) to provide for the protection of natural and man-made resources and the maintenance of ecological processes and genetic diversity; (c) to conserve and enhance those buildings, areas or other places which are of scientific, aesthetic, architectural or historical interest, or otherwise of special cultural value; (e) to protect public utilities and other assets and enable the orderly provision and co-ordination of public utilities and other facilities for the benefit of the community; (f) to facilitate development in accordance with the objectives set out in paragraphs (a), (b), (c), (d) and (e); (g) to balance the present and future interests of all Victorians."
[47] [2004] VCAT 2029 [39].

amendment and the effect. One way of assessing whether the nexus is sufficient will be to ask whether the effect may flow from the amendment".[48] His Honour referred to the EPBC Act where in certain circumstances regard must be had to "all adverse impacts" and also to the Federal Court decision of *Minister for the Environment and Heritage v Queensland Conservation Council Inc*[49] where the court observed "that the effect may be direct or indirect; and is not confined to direct physical effects" and concluded that "[c]ertainly in the context of the Victorian Planning and Environment Act, both these propositions also apply".[50]

Morris J concluded that:

> "…. a planning scheme may be made to further the objective of 'maintaining ecological processes'; and, further, 'to balance the present and future interests of all Victorians'. These are broad words. Ecological processes include processes within the atmosphere of the earth, including its chemistry and temperature. Many would accept that, in present circumstances, the use of energy that results in the generation of some greenhouse gases is in the present interests of Victorians; but at what cost to the future interests of Victorians? Further the generation of greenhouse gases from a brown coal power station clearly has the potential to give rise to 'significant' environmental effects. Hence I think it follows that a planning scheme could contain a provision directed at reducing the emission of greenhouse gases from a coal burning power station – not only to maintain an ecological process, but to balance present and future interests."

Morris J went on to find that a sufficient nexus existed between approval of the Amendment and the environmental effect of greenhouse gases likely to be produced from the Hazelwood Power Station beyond 2009. He said this was because the Amendment "is a necessary approval to give effect to the [Project], including the extension of the life of the Hazelwood Power Station"[51] or, put another way "the approval of the [Amendment] will make it more probable that the Hazelwood Power Station will continue to operate beyond 2009; which, in turn, may make it more likely that the atmosphere will receive greater greenhouse gas emissions than would otherwise be the case; which may be an environmental effect of significance."[52]

[48] [2004] VCAT 2029 [41].
[49] [2004] FCACF 190.
[50] [2004] VCAT 2029 [42].
[51] [2004] VCAT 2029 [46].
[52] [2004] VCAT 2029 [47].

CONCLUSION

Implications of these Decisions

The cases discussed indicate how the subject of greenhouse gas emissions can become relevant, in a number of ways, in an environmental planning context. The reasons for this include the following:

- Where a statutory duty exists to take account of the principles of ESD, consent authorities may be required to take into account the environmental impact of greenhouse emissions produced. Both the direct and indirect downstream impacts may be relevant. If the precautionary principle is found to have operation, project proponents will be required to take appropriate precautionary measures in respect of the project or development.
- Even where a statutory duty to take account of the principles of ESD does not exist, the environmental impact of greenhouse emissions of a project will likely be a relevant consideration required to be taken into account by the consent authority.
- The nature and extent of an assessment of the environmental impact of greenhouse emissions will be a matter of fact and degree and will depend upon the nature of the project and the jurisdiction within which consent is sought. Where there is a relative degree of certainty as to who the end user is and what the end use may be, it may be argued that the greenhouse emissions produced by the end-user (eg, in respect of a coal mine, the burning of the coal by an Australian power station) should be taken into consideration when assessing the environmental impacts of the proposed mine. On the other hand, it can be argued that such downstream impacts are not impacts "of the project" but of another undertaking quite unrelated to the project except for its hypothetical use of coal produced by it. Where the identity of the end-user or the end use is unknown, the logic of requiring the environmental assessment to include an assessment of downstream greenhouse emissions is even more problematic.
- Public, academic and judicial scrutiny of the adequacy of an environmental impact assessment has and continues to increase. Growing concern about the implications of climate change and global warming mean that this is particularly so where a project will produce greenhouse gas emissions.

A prediction that can be made with some confidence, is that the case law in this area will continue to develop over the next few years.

return to AMPLA 2006 Table of Contents