a number of other cases, including the High Court decision in *Marshall v Director General, Department of Transport* (2001) 205 CLR 603 where McHugh J said at 626:

> Injurious affection does not include damage resulting from the act of severing the land. That is a separate head of damage. But it includes any other injurious consequence, resulting from the exercise of a statutory power, which depreciates the value of or increases the cost of using the 'other land'. If the exercise of the power limits the activities on or the use of that land, interferes with the amenity or character of the land, deters purchasers from buying the land or makes it more expensive to use the land, the claimant is entitled to compensation for injurious affection.

Blow J noted at [18] that it was necessary to distinguish the direct effects of the acquisition of the easements relating to land within the easement corridors from the less direct effects of acquisition on land adjacent to the easement corridors. His Honour did not accept that safety and occupational health and safety issues were significant causes of injurious affection. On the other hand, he concluded at [34]-[47] that visual impact, sound and smell, impact on security and privacy, risk of contamination, restrictions on digging, use of heavy machinery, mining and fencing near the easement at the 'blot on title' were all causes of injurious affection. His Honour heard evidence from three valuers, ultimately coming to a figure of $50,350 for injurious affection, which was a modification of the figure submitted by one of the valuers. The total amount of compensation to be paid to the respondent was determined to be $73,857.85, excluding interest.

VICTORIA

HAZELWOOD POWER STATION GREENHOUSE GAS REDUCTION DEED*

On 6 September, 2005, the Victorian Government announced that it had entered into a Greenhouse Gas Reduction Deed with the owners of the Hazelwood power station that secured the ongoing operation of the power station while reducing greenhouse gas emissions. This article describes the main provisions of the Greenhouse Gas Reduction Deed which the Victorian Government stated is the first of its kind in Australia.

Background

International Power Hazelwood ("IPRH") is an electricity generator in the Latrobe Valley in Victoria. It holds mining licences to mine coal for the production of electricity. IPRH is seeking additional mining licences from the Victorian Government in order to ensure the continued operation of the Hazelwood Power Station ("the Power Station") by planning the West Field Development. The West Field Development is the proposed development by IPRH of the west field of the Morwell coal seam reserves at the Hazelwood Mine.

Due to the growing concern about greenhouse gas emissions from brown coal power stations, IPRH has committed to reduce its emissions over the remaining operating life of the Power Station

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to no more than 445 Mt CO_2 (equivalent). The terms and conditions of IPRH's commitment are set out in the Greenhouse Gas Reduction Deed ("the Deed").

Parties

The Parties to the Deed are the Crown in right of the State of Victoria (through its Minister for Energy Industries, Hon Theo Theophanous MP) and IPRH, which comprises the Hazelwood Power Partnership. This partnership consists of National Power Australia Investments Ltd, Hazelwood Pacific Pty Ltd, Australian Power Partners BV, Hazelwood Investment Company Pty Ltd and CISL (Hazelwood) Pty Ltd, trading as Hazelwood Power.

Aim of Deed

The aim of the Deed is to give legally binding effect to IPRH's voluntary agreement to reduce greenhouse gas emissions from the Power Station.

Emission Reductions

Greenhouse Cap

Under the Greenhouse Cap ("the Cap"), IPRH must ensure that the amount of greenhouse gas emitted from the existing boilers at the Power Station from 1 January 2005 (the Commencement Date) until the end of its operating life does not exceed 445 Mt CO_2 (equivalent). IPRH acknowledges that IPRH's obligations under the Cap are intended to be enforceable by the State by way of a permanent injunction to stop operations at the Power Station. Once the Cap is reached, IPRH must advise the State in writing.

Within six months of each Reporting Date (31 December 2010 and each six year anniversary of that date), IPRH must provide the State with a written report on the amount of gas emitted from the Power Station over the Reporting Period (from 1 January 2005 until and including the Reporting Date) and the amount of credits allowed over that time (see below). Further, IPRH must report to the State on whether the gas emitted, after allowing for the credits, is more or less than the Corresponding Progressive Amount ("CPA"), and if it is more, provide an explanation.

The CPA for the Reporting Period ending on 31 December 2010 is 106 Mt CO_2 (equivalent). This amount increases steadily in six year increments. However, the CPA is an estimate only and IPRH is not required to ensure that emissions from the Power Station do not exceed the CPA over a Reporting Period. Specifically, IPRH's liability to comply with the Cap does not apply if the CPA is exceeded but continues to remain under the Cap (445 Mt CO_2).

However, if a report reveals that IPRH exceeds the CPA, the Minister may appoint someone to determine whether IPRH has used its best endeavours to reduce the emissions intensity from the Power Station, to the extent that it is commercially viable. This person must submit a written report to the Minister within 60 days. This must be provided to IPRH and the parties must convene to consider it within 14 days. The Minister may advise Parliament in respect to any proposed action in response to the Report.

Reduction in Greenhouse Intensity

There is a separate obligation placed on IPRH to use its best endeavours to reduce the greenhouse emissions intensity (measured in tonnes of CO_2 (equiv) per MWh) of the Power Station to the extent that it is commercially viable to do so.

Offsets

In calculating the amount of greenhouse gas emitted from the Power Station, a credit is allowed for each MWh of electricity generated by any wind farm or other Renewable Energy Project ("REP"),[1] in respect of which IPA was the lead developer and the creation of which was completed when IPA (International Power Australia) held over half of the equity interests in IPRH**.** "IPA" refers to the group of Australian companies, partnerships and other entities operating in Australia, in each of which International Power plc has an equity interest, including IPRH (the Hazelwood Power Partnership).

The amount of credit, in tonnes CO_2 (equivalent), is to be calculated as follows:

(i) the Applicable Greenhouse Gas Displacement Value (Displacement Value) (the meaning of which is explained below);

multiplied by:

(ii) in the first ten years after the completion of the wind farm or other REP, the proportion of IPA's equity interest in either of these as at the time of initial financial closing of the wind farm or other REP relative to total equity interests in them as at that time; and

(iii) following that ten year period, the proportion of IPA's equity interest in the wind farm or other REP, as at the time the MWh of electricity is generated relative to total equity interests in either of these as at that same time.

In any other instance where IPRH believes that it should receive a credit, the parties must negotiate in good faith whether it should be allowed and the amount of any such credit. Regardless of the prescribed formula for the calculation of emissions, no credit will be given in respect to electricity generated by a wind farm or other REP after IPRH has violated the Cap.

The Deed provides a formula for the determination of the Displacement Value in relation to wind farms and other REPs. The Displacement Value is used to calculate the amount of credit in tonnes CO^2 (equivalent) IPRH receives for every MWh of electricity generated by any wind farm or other REP.

In the case of wind farms, for the five years from 1 January 2005, the Displacement Value of a MWh of electricity generated by a wind farm is 1t CO_2 (equiv). After each five year anniversary from the Commencement Date (1 January 2005), the then applicable Displacement Value is to be reviewed having regard to the prevailing greenhouse gas displacement value of the MWh of

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[1] This term refers to another power generation facility in Victoria which is completed after 1 January 2005 in which International Power Australia has an equity interest and which generates electricity using a renewable energy source.

electricity generated by a wind farm. The new Displacement Value (to prevail for the next five year period) is to be agreed by the parties or determined under the dispute resolution procedure.

Calculation of greenhouse gas emitted

The amount of greenhouse gas emitted from the Power Station is calculated currently under the GES Scheme. This refers to the program known as "Generator Efficiency Standards" which is implemented by way of deeds of agreement between the Commonwealth and business entities, including IPRH.

IPRH must ensure that the amount of greenhouse gas emitted from the Power Station (regardless of its fuel source) is calculated, recorded and reported on by IPRH, and verified and reviewed in accordance with the GES Scheme. It must also ensure that the amount of electricity generated by any wind farm or other REP is calculated, recorded and reported on by IPRH, and verified and reviewed in accordance with the Commonwealth's Mandatory Renewable Energy Target (MRET) program.

If the GES Scheme terminates, the amount of greenhouse gas emitted from the Power Station must be calculated, recorded and reported on by IPRH, and verified and reviewed in accordance with the terms of the GES Scheme as they were immediately prior to the termination. Further, if the MRET Program terminates, the amount of electricity generated by any wind farm or other REP must be calculated, recorded and reported on by IPRH, and verified and reviewed in accordance with the terms of the MRET Program as they were immediately prior to the termination.

IPRH must provide the State with a copy of any report relating to greenhouse gas emissions from the Power Station or of the amount of electricity generated at a wind farm or at a REP pursuant to the GES Scheme or the MRET Program.

Interaction with Future Greenhouse Gas Abatement Schemes

Any future greenhouse gas abatement scheme will still apply to the Power Station, which may also require IPRH to reduce emissions from the Power Station. The Deed will continue to operate regardless of such a scheme coming into effect. However, any reduction in emissions achieved by IPRH in compliance with a scheme will still be taken into account for the purposes of the Deed.

The Deed does not prevent IPRH from receiving any greenhouse credits (legal, commercial or other benefits) under such a scheme or voluntary greenhouse gas emissions trading scheme.

In designing any future greenhouse gas abatement scheme, the State will ensure that IPRH's obligations under the Deed are reasonably taken into account and that IPRH is treated equitably under the scheme. If a credit is allowed to IPRH in respect of one of its obligations under the scheme to reduce emissions from the Power Station in a scenario that is not envisaged by the Deed, IPRH may request that it be amended so that IPRH is given an equivalent credit for the purposes of the emissions reduction under the Deed. The parties must negotiate any such proposal in good faith.

Research and development, demonstration and commercialisation of greenhouse abatement technologies

Reports

IPRH must provide the Minister with a written report (excluding commercially sensitive information) on the advancement of its internal research and development into, and demonstration and commercialisation of, new fuel drying technology and other greenhouse abatement technologies. The report must be made within six months of the end of each year and otherwise within six months of the Minister requesting it.

New Technology

In order to facilitate the establishment of a demonstration brown coal technology project (which is to be located on IPRH's land at Hazelwood), the IPRH must use its best endeavours to reach an agreement with a proponent approved under the Law Emission Technology Fund, the Energy Technology Innovation Strategy or any similar scheme to supply:

(a) an agreed quantity of coal to the demonstration plant, at a cost which is no more than is required to make the supply of that coal commercially viable for IPRH, over a period which is the lesser of three years from commencement of coal supply and until the demonstration plant commences commercial operation. After this time and beyond the agreed quantity, any additional supply of coal may be on such commercial terms as IPRH and the approved opponent agree; and

(b) other services at cost provided that, in IPRH's absolute discretion, such supply is practicable for IPRH and will not materially adversely effect its' operations.

IPRH must use its' best endeavours to reach an agreement with the approved proponent to facilitate the commercialisation of the demonstrated technology.

Conditions Precedent: No legal force until conditions satisfied

The Deed has no legal force unless and until various conditions are satisfied including:

(a) the revocation of the Mining Licence Exemption, which means the exemption granted by the Minister under s 7 of the *Mineral Resources Development Act 1990* (Vic) in respect of a specified portion of the land the subject of the West Field Development;

(b) the granting of all further mining licences necessary to entitle IPRH to carry out mining on the land the subject of the West Field Development;

(c) the granting of all relevant third party, local government, State and Commonwealth regulatory approvals or other consents necessary for IPRH to proceed with the West Field Development and the required improvements to the Power Station, including all planning scheme amendments, work plan and work authority approvals and consents, on terms reasonably satisfactory to IPRH; and

(d) IPRH becoming the registered proprietor of all private land necessary to proceed with the West Field Development, whether by treaty or compulsory acquisition.

These conditions are for the benefit of IPRH and can only be waived by IPRH. To the extent that it is commercially viable for IPRH to do so, it must use its best endeavours to ensure that the above conditions are satisfied and it must keep the State informed of any circumstances which may result in those conditions not being satisfied.

Liability

A formula is specified in the Deed for calculation of the payment due from IPRH to the State for a breach of the Cap.

For each tonne of greenhouse gas emitted from the Hazelwood Power Station in excess of the Cap, IPRH must pay the State the lesser of $10 (subject to the percentage increase in CPI, calculated relative to the December 2004 quarter) and the marginal dollar cost of abatement of one tonne of greenhouse gas from electricity generation in the national electricity market as at the date the extra tonne of greenhouse gas is emitted in excess of the Cap.

This amount is a cap on IPRH's liability for a breach of the Cap. In respect of all breaches of the Deed (other than a breach of the Cap), IPRH's liability is capped at $2,000,000 (subject to the percentage increase in CPI, calculated relative to the December 2004 quarter). The limitation of IPRH's liability to damages does not affect the right of the State to any other remedy for a breach by IPRH of the Deed.

The State acknowledges that any claim shall be made against IPRH, and not International Power Australian or any other related entity.

Conclusion

While the Deed has been attacked by environmental groups, it has been regarded by business as a positive step in securing Victoria's ongoing supply arrangements. It will remain to be seen whether the approach set out in the Deed of capping greenhouse gas emissions over the life of the Power Station is practical and effective. It will also be interesting to observe whether the approach is suited only to Victoria's unique circumstances (in that Victoria is highly dependent for its power supply on the use of brown coal) or whether the "greenhouse cap" model could have application in other States and Territories of Australia.

IMPLYING THE DUTY OF GOOD FAITH INTO ASSIGNMENT CLAUSES IN JOINT VENTURE AGREEMENTS[*]

Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL (recs and mgrs apptd) (admins apptd) [2005] VSCA 228, Warren CJ, Buchanan JA and Osborn AJA, 15 September 2005

Joint venture agreement – insolvency of a party – assignment of the its interest – construction of assignment clause – whether a duty of good faith is implied – whether the party had acted in good faith.

Facts and nature of the action

Esso Australia Resources Pty Ltd ("Esso"), Southern Pacific Petroleum ("SPP") and Central Pacific Minerals (CPM) formed a joint venture to exploit mineral tenements and produce shale oil

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[*] Andrea Blake, Senior Associate, and Andy Haining, Articled Clerk, Blake Dawson Waldron, Melbourne.