in different States are relevant. The Court considered it relevant that the present offences were committed in 2009 but the proceedings did not commence until mid 2011, and the quarantine offences were committed in 2006, and the trial was not heard until 31 March 2010. The Court's decisions in *Todd* and *Neal* suggested that a long delay in the trial or punishment of an offender with the consequent uncertainty as to what will happen are relevant considerations. The judge accepted the appellant's evidence and the term of imprisonment served before being sentenced with the present offences were salutary and contributed to his rehabilitation

- no reference was made to the principle of totality by the Local Court.

Considering the principle of totality, the Judge noted that the penalty he would have otherwise applied was $9 600 with a 25% deduction to $7 200 per offence. Applying the totality principal, the penalty for the second offence was reduced to $5 000.

Hunter Environment Lobby Inc v Minister for Planning (No 3) [2012] NSWLEC 102

by Natasha Hammond-Deakin*

Background

These proceedings concerned a third party objector appeal under s 75L of the *Environmental Planning and Assessment Act 1979* (NSW) ('EPA Act'), in which the Hunter Environment Lobby ('HEL') challenged the grant of project approval by the minister to Ulan Coal Mine Pty Limited ('Ulan') allowing for the expansion of an existing coal mine near Mudgee. HEL was concerned about the potential environmental impacts of the coal mine and it raised contentions in relation to groundwater, biodiversity and greenhouse gas ('GHG') emissions. It sought that the project be refused or, if the Court was minded to approve the project, that stricter conditions be imposed. The conditions sought included a condition requiring Ulan to offset the mine's scope 1, 2 and 3 GHG emissions, and this was the first time a court in Australia considered a condition of this kind. In final address the applicant withdrew its claim in relation to scope 3 emissions.

In *Hunter Environment Lobby Inc v Minister for Planning* (No 1) [2011] NSWLEC 221 *(No 1)* the Court approved the expansion of the coal mine subject to conditions, and sought additional information from the parties in order to finalise a number of the conditions. The Court expressed an intention to impose the GHG condition, but sought further submissions in light of the enactment of the *Clean Energy Act 2011* (Cth) and related legislation.

Following receipt of submissions from the parties, the Court finalised the groundwater and biodiversity offset conditions which included the requirement that two distinct offset areas be linked up by a biodiversity corridor to form part of the offset package. However, in *Hunter Environment Lobby Inc v Minister for Planning* (No 2) [2012] NSWLEC 40 the Court determined not to impose the GHG offset condition on the basis that the emissions would be largely regulated under the Commonwealth legislation when it commences on 1 July 2012. The Court also noted that there was an unsatisfactory level of uncertainty in relation to the development of the Australian market for carbon credits. The Court noted that it was not necessary for it to resolve whether there was a constitutional conflict between the Commonwealth carbon scheme and the NSW environmental protection laws; an issue that had been raised by Ulan.

Costs hearing

Ulan sought that HEL pay all of its costs in relation to the greenhouse gas issue pursuant to Rule 3.7 of the *Land and Environment Court Rules 2007*. It argued that this was fair and reasonable on the basis that:

- the GHG offset condition should never have been pressed
- HEL should not have pressed for refusal of the project on the basis of GHG issues
- HEL should not have pressed for the offset conditions after the passage of the *Clean Energy Act 2011* (Cth), as that legislation rendered the condition unnecessary
- the GHG offset condition was unreasonable, unworkable and irrational
- the total GHG emissions of the project were relatively small
- had HEL limited its case to scope 1 emissions much of the expert evidence would not have been necessary
- the economic impact of the condition sought was effectively a refusal of the project as the condition would have rendered the project unviable

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- no market existed for the carbon credits required by HEL's condition
- the withdrawal of the claim for a condition to offset scope 3 emissions at the close of submissions was unreasonable conduct.

Decision

The Court dismissed the application for costs. It ordered that Ulan pay HEL's costs of the costs hearing.

Reasoning

Costs generally

- The starting point in class one merits appeals is that each party pay its own costs unless it is fair and reasonable in the circumstances of a particular case that costs should be awarded: Rule 3.7(2).
- Individuals and corporations who challenge a decision in merits appeal proceedings do not have the same obligations as a consent authority. There are no restrictions in s 75L on how an objector is to run an appeal, issues it must consider, or a requirement to consider the economic impact of the conditions it seeks.
- A third party objector to a Part 3A project can bring forward any issues it considers are insufficiently considered in the minister's assessment, provided these are rational and supported by adequately qualified expert evidence where this is needed. A third party objector's concerns are not defined by matters considered by the minister in approving the project.

Whether the applicant should have sought and maintained the GHG offset condition

- In the absence of policy or legislative framework on the issue of GHG emissions (at the time of the initial hearing), it was not unreasonable or irrational for HEL to suggest that the environmental impacts of GHG emissions could be addressed by a condition requiring offsets.
- The pursuit of an offset of scope 3 emissions was not unreasonable because Ulan was required to address scope 1, 2 and 3 emissions as part of the environmental assessment process. HEL's decision to later abandon scope 3 emissions in light of evidence that arose during the hearing was also reasonable.

HEL's claims were continually supported by expert evidence and therefore its decision to continue to seek GHG offset conditions was reasonable. Ulan should not be compensated for having to respond to such a condition.

Economic Impact

Ulan argued that the economic impact of the offsets through carbon credit purchase would render the project unviable and, therefore, it was unreasonable to press a condition requiring purchase of carbon credits. The Court disagreed, concluding that the economic viability of a particular proposal was not a material relevant consideration in environmental assessment under Part 3A. HEL was not bound to consider the economic impacts of its proposed offset conditions.

Whether the applicant should have sought and maintained its refusal of the project based on greenhouse gas emissions

The Court held that HEL did not act unreasonably or irrationally in proposing that the project be refused on the basis of its GHG emissions, noting that:

- The project involved significant expansions to production which would in turn result in significant emissions. It was also the first time such an issue was advanced in merits appeal proceedings.
- It may be fair and reasonable to award costs where a change of position in Class one proceedings results in costs being thrown away. However, in this case HEL acted responsibly when it abandoned its claim for refusal of the project.

Reysson Pty Limited v Roads and Maritime Services [2012] NSWLEC 17

by Penny Murray

Roads and Maritime Services ('RMS') compulsorily acquired land owned by Reysson Pty Limited. As a preliminary issue in the proceedings, because it would affect the market value of the land and Reysson's entitlement to compensation, the parties sought a declaration from the court as to whether a development consent for a staged 34