

residents in interviews, and the Project's extension through Saddleback Ridge would "exacerbate the loss of sense of place, and materially change and adversely change the sense of the community, of the residents of Bulga and the surrounding countryside".

Economic issues

The Court did not accept that the economic benefits of the Project outweighed the environmental, social and other costs. Warkworth had undertaken the Input-Output Analysis (IO Analysis), which assessed the incremental difference in economic impacts between approving or disapproving the Project, and the Benefit Cost Analysis (BC Analysis), which estimated the monetary values for the main intangible environmental, cultural and social impacts of the Project.

The Court held that the IO Analysis and the BC Analysis had deficiencies in the data and assumptions which affected the reliability of the conclusions and, more fundamentally, they did not assist in weighing the economic factors relative to the various environmental and social factors. The Court noted that the weighting and balancing of the relevant matters to be considered are essential tasks for a decision maker when determining the Project Application.

Implications

This refusal of the Project is the second coal mine expansion project to be refused by the Land and Environment Court in recent months. These judgments demonstrate willingness on the part of the Court to weigh up all the relevant matters and, in circumstances where environmental and other factors outweigh the economic benefits, refuse major coal projects overturning the findings of the PAC. The case has important implications for proponents of mining projects because it provides guidance in assessing the overall environmental, social and economic impacts of such projects. Where a mining proposal has significant adverse environmental impacts which are not made acceptable by avoidance measures or an offsets package, the Court has confirmed that this is a fundamental matter to be considered by the decision maker to which significant weight should be assigned. Following this decision, it is doubtful whether economic benefits alone could outweigh the significant adverse environmental impacts of a project.

Warkworth has appealed the decision to the NSW Court of Appeal. The NSW Government's response to this judgment is noted at www.corrs.com.au/publications/corrs-in-brief/the-economic-benefits-of-mining-proposals-to-be-primary-consideration/.

Victorian Civil and Administrative Tribunal

Cherry Tree Wind Farm Pty Ltd v Mitchell Shire Council [VCAT P2910/2012] (Cherry Tree) by Damon Jones* and Matthew Gregory**

The Victorian Civil and Administrative Tribunal (Tribunal) recently published an interim decision on an application for a 16 turbine wind energy facility between Melbourne and Seymour. The decision is important for two principal reasons:

- where an applicant has applied to amend an existing permit application, the Tribunal has clarified the point at which this amended application is taken to have been 'requested', and therefore, at which point developers must obtain written consent of owners of existing dwellings within a 2km radius of a proposed turbine
- the Tribunal made important observations on the health effects of wind energy facilities upon local inhabitants, and deferred its decision on the application pending publication of a report by the Environment Protection Authority of South Australia on the Waterloo wind farm (the EPASA Report).

Health effects

In accordance with clause 52.32 of the Mitchell Shire Planning Scheme (Planning Scheme), the Tribunal considered the level of wind farm noise as part of its decision making process. The Tribunal decided, dismissing expert evidence critical of the measurement itself, that the proposed development would comfortably satisfy the New Zealand Standard NZS6808-2010 (Standard).

The Tribunal further found that where the Standard referred to

*high amenity noise limits [being considered]
where a plan promotes a high degree of
protection of amenity related to the sound
environment of a particular area*

the reference to a 'plan' should be interpreted in the Victorian context as reference to a planning scheme. It found that the Planning Scheme does not expressly or impliedly promote a higher degree of protection of amenity for the subject land or its surroundings.

In considering the effect of the proposed development upon the health and wellbeing of local residents (a major emphasis of respondents' objections), the Tribunal concluded that the evidence presented by the parties was insufficient to determine the point.

The Tribunal elected to defer its decision until publication of a new report on wind farm noise by the South Australia's Environment Protection Authority which, it is anticipated, will address the fundamental question of whether a causal link exists between sound pressure emissions from wind turbines, and adverse health effects on local residents. It is noteworthy that the Tribunal remained cognisant of the fact that even if a causative link is proven, the weight which the Tribunal accords the issue, in balancing factors to achieve an *acceptable outcome* will depend upon the percentage of the population who actually suffer such causative effects. The application was adjourned until a date not later than 4 October 2013.

'Existing dwellings' determination date

Clause 52.32-2 of the Planning Scheme states that no turbine may be constructed within two kilometres of an existing dwelling, without written consent of the owner of any such dwelling.

The key question for the Tribunal to determine was whether an application to amend the existing permit application was made:

- on 14 November 2012, at a directions hearing, when the amendment was contemplated
- on 30 November 2012, when the application to amend the permit application was lodged with the Tribunal, in the form required by Practice Note PNPE9, or
- on 29 January 2013, on the first day of the hearing, when the applicant sought leave from the Tribunal to amend the permit application.

The Tribunal was inclined to the view that the correct date to assess when the 'request to amend the permit application' was made, i.e. 30 November 2012. The basis for this conclusion was that form PNPE9 refers to an amendment application having already been made, in which case, at the point that this formality is satisfied, and the form is lodged with the Tribunal and circulated to the parties, the form suggests that the application is treated as having already been made.

Notwithstanding this conclusion, the Tribunal proceeded on the basis of a conservative approach. It considered whether, at 29 January 2013, any land within 2km of a proposed turbine was used for an 'existing dwelling'. Having considered evidence on the stage of development of two

properties within 2km of a proposed turbine, and the level of proposed occupation, the Tribunal found that no dwelling existed on 29 January 2013 and therefore, could not have existed on 30 November 2012.

This decision therefore suggests that where an application to amend a permit application had been made, the date to assess whether existing dwellings are within 2km of a proposed turbine is the date that the applicant seeks the leave of the Tribunal to amend the application.

This is significant for developers seeking to amend a permit application in circumstances where future dwellings are under construction in the vicinity of proposed wind turbines.

The Tribunal dispensed with arguments from respondents that clause 52.32-2 operated prospectively to prohibit the operation of an existing wind energy facility when a later dwelling was constructed within 2km; noting that

the purpose of the legislation...is 'to facilitate the establishment and expansion of wind energy facilities' (clause 52.32). The interpretation contended for would serve the antithesis of this purpose.³

Queensland Planning and Environment Court *Rainbow Shores P/L v Gympie Regional Council & Ors* [2013] QPEC 26 by Mark Baker-Jones*

Sea level rise impact on coastal development must now be taken into account

After 35 days of hearing, the Queensland Planning and Environment Court has delivered its most significant climate change adaptation decision yet. *Rainbow Shores P/L v Gympie Regional Council & Ors*⁴ sets a new precedent for decision makers considering development in the Queensland coastal zone.

3 * Senior Associate, Norton Rose Fulbright Australia
**Graduate Lawyer, Norton Rose Fulbright Australia
Cherry Tree Wind Farm Pty Ltd v Mitchell Shire Council,
VCAT Reference No P2910/2012, para 38.

4 *Special Counsel, DLA Piper, Brisbane.
[2013] QPEC 26