

Supreme Court Decision on Coal Mining Activities

The Supreme Court has recently released its decision in *West Coast ENT Inc v Buller Coal Limited* [2013] NZSC 87. The decision marks an end to long running declaratory proceedings regarding the relevance of effects on climate change from the combustion of coal when assessing mining activities.

Background

Buller Coal Limited ("Buller Coal") and Solid Energy Limited ("Solid Energy") applied for resource consents to extract coal on and around the Denniston Plateau in Westland. The applications were opposed by West Coast ENT Incorporated ("West Coast ENT") and the Royal Forest and Bird Protection Society of New Zealand Inc ("Forest and Bird").

Due to provisions in the Buller District Plan, the effects the territorial authority can take into account when considering consents to mine coal are those set out in the District Plan. Those effects do not include the effect of discharges of greenhouse gases on climate change.

However, in order to extract coal, Buller Coal and Solid Energy require consents for ancillary mining activities such as roading and the taking, diverting and use of water. West Coast ENT and Forest and Bird argue that the effects of climate change can be considered to be an effect under section 104(1)(a) of the Resource Management Act 1991 ("the RMA") for the purposes of those ancillary resource consents.

In order to avoid potentially lengthy and expensive debate, all parties applied to the Environment Court for declarations concerning whether such effects could be considered by territorial and regional authorities.

The Environment Court judgment

In the Environment Court, Judge Newhook granted the declarations sought by Buller Coal and Solid Energy. His Honour placed significance on the Resource Management Amendment Act 2004 ("the 2004 Amendment Act"). Section 3 in particular, pointed strongly to a finding that regulatory activity of climate change is taken firmly away from regional government, and made the subject of appropriate attention by central government by way of activity at a national level.

Following that decision, West Coast ENT and Forest and Bird both appealed to the High Court.

The High Court judgment

Justice Whata dismissed the appeal based on five grounds:

1. The policy underlying the 2004 Amendment Act as set out by Judge Newhook;
2. Section 104(1)(a) of the RMA, prevents local authorities from controlling discharge to air of greenhouse gases.
3. The discharge of carbon dioxide as a result of burning coal in New Zealand is irrelevant to whether consents should be granted for coal extraction because:
 - a. The burning of the coal is not itself the "activity" for which consent is sought; and
 - b. Such burning will need to be allowed by a national environment standard, a regional plan rule or a discharge to air resource consent from a downstream user;
4. The use of consents to control the discharge to air of greenhouse gases would undermine the methods preferred by Parliament to control greenhouse gas discharges; and
5. District Councils could still use urban planning and transportation strategies to mitigate the climate change effects of greenhouse gas emissions.

Justice Whata then turned to address the issue of overseas discharges. Discharges of greenhouse gas from coal mined in New Zealand but combusted overseas cannot be subject to national environment standards since there is no jurisdiction. Those discharges and their effects are not subject to the jurisdiction of a local authority. His Honour admitted that this appears to be contrary to the idea of sustainable management, but local authorities have no way of applying sustainable management principles to overseas jurisdictions.

A more detailed analysis of Justice Whata's decision can be found [here](#).

Following Justice Whata's dismissal of the appeal, the Environment Court delivered an interim judgment granting the necessary consents to Buller Coal subject to conditions which have yet to be finalised.

The Supreme Court judgment

In a split decision, Justices McGrath, William Young and Glazebrook dismissed the final appeal by West Coast ENT and Forest and Bird. Chief Justice Elias gave a dissenting judgment.

The Majority judgment

The majority of the Supreme Court agreed with the statutory interpretation undertaken by Justice Whata.

The majority of the Supreme Court considered that even if climate change could be taken into account, the effects were too indirect. The climate change effects of burning coal are irrelevant to the ancillary mining applications Buller Coal and Solid Energy seek. The eventual burning of coal overseas is not closely associated with, for instance, the construction of a road on the West Coast.

The effects of burning coal were also thought to be too intangible. Buller Coal and Solid Energy aim to produce coal to meet an existing market. If they do not supply coal, overseas manufacturers will presumably obtain coal from other suppliers. Whatever happens in New Zealand, those manufacturers will continue to emit greenhouse gases. Furthermore, it would be difficult and probably impossible to show that the burning of coal from West Coast mines would have any perceptible effect on global climate change.

The minority judgment

In her dissenting judgment, the Chief Justice considered that the targeted and partial exclusion of the effects of climate change in the 2004 Amendment Act is limited to local authority regulation of and consent to the discharges of greenhouse gases into air. However, the current proceeding did not include an application for discharges into air, so do not come within the exclusion of the 2004 Amendment Act. Her Honour considered that the scheme of the RMA did not constrain the meaning of any "adverse effect of the activity for which consent is sought". Effects can only be excluded by a national environmental standard. There is no applicable environmental standard in this case.

Chief Justice Elias did not think the effects on climate change were too remote or indirect. Her Honour observed that the RMA allows the effects of an activity on climate change to be considered when the use of renewable energy permits a reduction in the discharge of greenhouse gases into air. Her Honour also thought that even if the emissions from burning coal from one mine were minimal, they contributed to a wider global effect. That is precisely the sort of cumulative effect that the Act permits to be taken into account.

Conclusion

The Supreme Court's decision removes another potential barrier to Buller Coal obtaining the necessary consents to develop its Escarpment Mine on the Denniston Plateau.

If you would like more information on this decision, or want to know how it may affect you, please contact one of our specialist Resource Management team.