

## High Court decision on relevance of effects on climate change from the end use of coal to coal mining activities

The High Court has confirmed the decision of the Environment Court that consent authorities cannot take into account the effects on climate change of the end use of coal when considering an application for consent for coal mining activities (Royal Forest & Bird Protection Society of New Zealand Incorporated v Buller Coal Limited [2012] NZHC2156).

### Background

The background to this decision is that Buller Coal Limited (BCL) and Solid Energy New Zealand Limited ("Solid Energy") have applied for resource consents for new coal mines on the Denniston and Stockton Plateaux. The BCL application was the first to be heard and was granted by the Buller District Council and the West Coast Regional Council. The Royal Forest & Bird Protection Society of New Zealand ("Forest & Bird") and West Coast ENT Incorporated ("WCENT") appealed the decision to grant consent on a number of grounds, including that the commissioners had not taken into account the effects of the end use of the coal to be mined on climate change. BCL and Solid Energy jointly sought a declaration from the Environment Court to confirm that the consent authorities were precluded from taking these effects into account. The Environment Court granted the declaration sought by BCL and Solid Energy (Re Buller Coal Ltd [2012] NZEnvC 80).

### High Court decision

The High Court agreed with the Environment Court that the unambiguous policy of the Resource Management Act 1991 ("RMA"), as amended by the Resource Management (Energy and Climate Change) Amendment Act 2004 (Amendment Act), is to secure coherent regulation of greenhouse gas emissions at a national level and subject to national instruments. The Amendment Act specifically removed the power from regional authorities to consider effects on climate change of the discharge of greenhouse gas emissions, except in accordance with a national environmental standard ("NES"). The High Court held that any on-going or residual district level control of greenhouse gases through consenting processes for land use activities cannot be reconciled with the detailed framework of the RMA.

The High Court also held that jurisdiction under section 104(1)(a) is limited to assessing the actual and potential effects of "allowing the activity", in this case coal extraction. The discharge of greenhouse gases is not allowed by the land use consent and in New Zealand would need to be allowed by an NES, regional rule or resource consent. The effects of those discharges are therefore presumed to be irrelevant to the assessment of the land use activity.

This leaves the issue of the discharge of greenhouse gases from the burning of the coal overseas. On this issue, the High Court held that it could not have been in the contemplation of Parliament that local authorities would endeavour to regulate greenhouse gas discharges and their effects overseas, not least because of the difficulties involved in assessing the adequacy of controls in a foreign jurisdiction.

The High Court left open the question as to whether diffuse, non-point emissions of greenhouse gases (for example vehicle emissions) are amenable to district level control. This will depend on the facts of the particular case.

## Where to from here

The High Court decision may be appealed to the Court of Appeal, subject to obtaining leave (from the High Court) or special leave (from the Court of Appeal).

If you have any queries regarding the implications of this High Court decision, please do not hesitate to get in contact with us.



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