Merit appeals and the need for reform: Warkworth Mining Ltd v Bulga Milbrodale Progress Association Inc

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In *Warkworth Mining Ltd v Bulga Milbrodale Progress Association Inc*,[1] the NSW Court of Appeal upheld the decision of the NSW Land and Environment Court (LEC) to refuse approval for the expansion of the Warkworth Mine near Bulga, NSW.[2]

The Court of Appeal decision contains some useful lessons for proponents of major projects, specifically with respect to project design and assessment, and also in how best to manage appeals.

The case highlights inefficiencies in the major projects assessment process and areas for reform.

Background

In March 2010, Warkworth Mining Limited (Warkworth) lodged a major project application under Pt 3A of the Environmental Planning and Assessment Act 1979 (NSW) (EPA Act) for the expansion of the Warkworth Mine near Bulga in the Hunter Valley, NSW. On 3 February 2012, the Planning Assessment Commission (PAC), as delegate for the Minister for Planning and Infrastructure (Minister), conditionally approved the project subject to conditions.

An association of local residents, the Bulga Milbrodale Progress Association (Association), commenced proceedings appealing the PAC's decision. In proceedings of this type, the LEC is required to undertake a fresh assessment of the project and determine whether the project should be approved. On 15 April 2013, the LEC determined the project application by way of refusal.

Warkworth and the Minister appealed the LEC's decision to the NSW Court of Appeal. In a unanimous decision delivered on 7 April 2014, Bathurst CJ, Beazley P and Tobias AJA upheld the LEC's decision to refuse approval for the project.

Land and Environment Court

The reasons for the LEC's refusal of the project were as follows:

1. The project would have significant adverse impacts on biodiversity, including on certain endangered ecological communities (EECs) and threatened fauna, which would not be adequately compensated for by Warkworth's proposed offsets package.
2. The noise and air quality criteria proposed for the project were not appropriate and the combination of criteria and mitigation strategies for the Warkworth Mine and Mount Thorley Mine was of "doubtful legal validity" and "would make monitoring and enforcing compliance difficult".
3. The economic modelling carried out by Warkworth was "of limited value" in resolving a "polycentric problem" as it failed to recognise the interdependent nature of the costs and benefits of the project.
4. The project would have adverse social impacts, including on the health, amenity and composition of the Bulga community.

Court of Appeal

Warkworth challenged the LEC's decision on 13 grounds, relating to the court's assessment of noise impacts, biodiversity impacts, the public interest and the economic modelling undertaken by Warkworth, as well as the weight given by the LEC to the Director-General's assessment report (DG Report) and the Mining Act 1992. The Minister cross-appealed on two grounds, essentially raising the same issues as Warkworth with respect to the weight given to the DG Report.

The Court of Appeal applied well-established principles of administrative law in dismissing the appeals by Warkworth and the Minister. The grounds of appeal and the court's decision are discussed in further detail below.

Noise impacts — denial of procedural fairness

Warkworth alleged that it was denied procedural fairness in relation to a finding by the LEC that the background noise level adopted for setting the intrusive noise criteria was too high. Warkworth claimed that it was "taken by surprise" by this issue, since none of the Association's grounds of appeal related to background noise levels and the Association did not call any expert evidence on noise levels, or cross-examine the Minister's noise expert in relation to this matter. It also alleged

that a refusal by the LEC to permit the reading of a further affidavit by the Minister's noise expert amounted to a denial of procedural fairness.

The Court of Appeal acknowledged that the requirement under s 38(1) of the Land and Environment Court Act 1979 that proceedings in the LEC's Class 1 jurisdiction are to be brought with as little formality as possible, does not abrogate the fundamental requirements of procedural fairness in those proceedings.[3]

The court held that there had been no denial of procedural fairness in this case, as Warkworth was well aware that the issue of background noise had been put in issue by the Association in its oral submissions, and the further affidavit sought to be relied upon did not respond to the issue at hand.[4]

Biodiversity impacts — denial of procedural fairness and legal error

Warkworth challenged the LEC's determination that there was insufficient evidence to establish that the biodiversity offsets package would adequately offset impacts on fauna, on the basis that it amounted to a denial of procedural fairness in circumstances where it was not clear that the offsets package was in issue insofar as it related to fauna. The Court of Appeal considered that the Association's case sufficiently raised this issue and accordingly found no denial of procedural fairness.[5]

Warkworth also alleged that the LEC's consideration of the adequacy of its proposed offsets package involved legal error, because the court took into consideration the lack of avoidance measures proposed by Warkworth, and discounted the compensatory value of the offsets proposed on the basis that they did not contain the same EECs as the disturbance area.

The court rejected these submissions. The fact that Warkworth did not propose any measures to avoid or mitigate the ecological impacts of the project, but merely proposed to offset those impacts, was held to be a relevant consideration when determining the sufficiency of the offsets package.[6] The court also considered that it was open to the LEC to make a finding that the offsets package could not be taken into account because it did not contain the same EEC communities as those impacted by the project.[7]

Polycentric problem — denial of procedural fairness

Warkworth contended that it had been denied procedural fairness because the LEC had approached the decision-making process on the basis that it involved the resolution of a "polycentric problem" without raising its intention to do so, and had used the polycentric approach to reject the evidence of its economic experts.

The Court of Appeal did not find any error in the adoption by the LEC of a polycentric approach, or the finding that the Benefit Cost Analysis and Choice Modelling undertaken by Warkworth's experts was inadequate when applied to a polycentric problem.[8] The court emphasised that a judge is entitled to accept, reject, or determine the adequacy of evidence as part of the litigation process and found no denial of procedural fairness in the LEC's determination that the economic evidence was wanting.[9]

Public interest

Warkworth alleged that the LEC's consideration of the public interest was too narrowly focussed on the adverse amenity impacts of the project and should have also had regard to wider public interest issues, such as state and regional socio-economic issues.

The Court of Appeal held that the requirement to have regard to the public interest "operates at a high level of generality" and that the range of matters relevant to the public interest is very wide.[10] Both the economic benefits of the project and evidence of adverse community responses to the project were relevant matters of public interest.[11] The court did not find any error in the LEC's consideration of the public interest.

The weight given to the economic benefits of a project by the Minister and courts in future proceedings is likely to be greater as a result of amendments made to the State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007 (Mining SEPP) in 2013.[12] Those amendments elevate economic considerations and resource significance as the primary considerations in assessing projects. Significantly, the LEC and Court of Appeal decisions in relation to the Warkworth expansion project did not consider the Mining SEPP as amended.

Director-General's Assessment Report — legal error

Warkworth and the Minister alleged that the LEC failed to give proper weight to the DG Report, which recommended approval of the expansion project. The DG Report and its recommendation for approval were argued to have "prima facie weight", and ought to have been the "focal point" or "fundamental element" in the LEC's decision whether to grant approval.

The Court of Appeal held that while s 75J(2) of the EPA Act (now repealed)[13] made the DG Report a mandatory consideration for the Minister when determining whether to grant approval for the project, it did not require the Minister to give primary importance to the recommendation in the DG Report. The court considered that to give more weight to the DG Report

would constrain and interfere with the Minister's and LEC's statutory decision-making responsibility.[14]

The Court of Appeal also held that there is no requirement for the consent authority to articulate reasons why the recommendation made by in the DG Report should not be followed.[15]

Mining Act

In making its decision, the LEC did not have regard to the Mining Act 1992, the mining leases held by Warkworth for the existing mine, or the impact the decision would have on Warkworth's existing mining rights. Warkworth alleged that the Mining Act was relevant legislation to which the LEC should have had regard.

The Court of Appeal held that the Mining Act was not a relevant consideration, because it does not deal with the grant of development consent for mining activities and the requirement that development consent be obtained prior to the grant of a mining authority is a clear legislative indication that questions of development consent and the grant of an authority are separate and distinct processes.[16]

Lessons learned

In its judgment, the Court of Appeal restated a number of well-established principles concerning environmental impact assessment and administrative law, which may be summarised as follows:

1. where possible, measures should be adopted to avoid and mitigate impacts on biodiversity, rather than simply offsetting those impacts;
2. biodiversity offsets must truly act as an offset of the impact in question, and therefore must include the same EECs as those impacted by the project;
3. economic modelling must take into consideration the polycentric nature of the impacts of a project;
4. a proponent must be able to positively demonstrate that all impacts of a project are acceptable. The LEC may refuse a project on the basis of any relevant matter on which it has heard evidence whether that matter is in issue between the parties or not; and
5. in the assessment of a project, the DG Report is not to be automatically given determinative weight by a consent authority. Where a project is referred to the PAC for determination, or the LEC on appeal, the proponent must undertake the assessment and work necessary to satisfy the consent authority that the project is appropriate for approval. That the Department of Planning and Environment (DoPE) was satisfied is relevant and may even be persuasive before the consent authority, but it is not determinative.

The need for reform

Warkworth highlights the need for reform to the process for assessing major projects (now referred to as "State significant development" (SSD)) in NSW.

A period of more than 4 years passed between the making of the application to expand the Warkworth Mine and the decision of the Court of Appeal. Notwithstanding that the project was the subject of:

1. a detailed environmental impact statement by independent experts retained by the proponent;
2. a detailed assessment by DoPE and the Director-General;
3. an independent peer review commissioned by DoPE; and
4. an independent assessment by the PAC,

the project approval was set aside by the LEC, following a further full merits review.

Even with the best efforts of DoPE, the PAC and the parties to an appeal, there is the clear potential for duplication in the assessment of SSD in NSW. The tiers of merit assessment through which a project must pass supports the view that merits review of SSD should be limited.

Currently, all SSD proposals are determined by the PAC under delegation by the Minister. Where the PAC is the determining authority, a project is subject to another layer of assessment by an independent and expert body outside the DoPE. In such cases, it is difficult to see why objectors should have recourse to the LEC if they are not satisfied with the PAC's determination.

No right of appeal is presently available against a determination by the PAC following a public hearing. A public hearing is arguably a more cost efficient forum for objectors to ventilate concerns and to challenge the expert assessments relied upon by the proponent. The holding of public hearings in relation to all complex and controversial SSD projects would avoid lengthy disputes in court.

Duplication may also be avoided by limiting merit review of certain aspects or impacts of a development. For example, unless there is some demonstrable legal error in the decision-making process applied by the PAC, the assessment of socio-economic impacts by the PAC should not be open to merit appeal, but remain subject to judicial review.

The alternative to the above would be to remove a layer of assessment by abolishing the PAC. The appeal rights of proponents and objectors would remain as currently available.

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Footnotes

1. *Warkworth Mining Ltd v Bulga Milbrodale Progress Association Inc* (2014) 200 LGERA 375; 307 ALR 262; [2014] NSWCA 105; BC201402357.
2. *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure* (2013) 194 LGERA 347; [2013] NSWLEC 48; BC201301826.
3. Above, n 1, at [38].
4. Above, n 1, at [111] and [112].
5. Above, n 1, at [143].
6. Above, n 1, at [334] and [335].
7. Above, n 1, at [340].
8. Above, n 1, at [170].
9. Above, n 1, at [169].
10. Above, n 1, at [299].
11. Above, n 1, at [296] and [301].
12. State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) Amendment (Resource Significance) 2013.
13. Part 3A of the Environmental Planning and Assessment Act 1979 (NSW) (including s 75J) was repealed on 1 October 2011. The Director-General's assessment report is still a mandatory consideration in relation to State significant infrastructure (under Pt 5.1 of the Act) but is no longer a mandatory consideration in relation to State significant development (Pt 4.1 of the Act). However, in practice, the Director-General continues to prepare assessment reports for State significant development.
14. Above, n 1, at [230].
15. Above, n 1, at [230].
16. Above, n 1, at [321] and [322].