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## WHITE PAPER

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### Review of Recent Mining Cases in Australia

In this *White Paper*, we examine three recently decided Australian cases that separately provide guidance on topics of interest to the mining sector.

In the first, the court refused planning approval for a new open cut coal mine in the Gloucester Valley in New South Wales. The refusal was predominantly based on significant net negative social impacts. In the second, the implied duty of cooperation in commercial contracts was applied in the context of a provision requiring a payment for the achievement of a certain measured resource milestone. In the third, the court implied a term dealing with the completion of a feasibility study in determining whether a company had completed the study and earned an interest in an exploration licence.

## INTRODUCTION

In this *White Paper*, we examine three recently decided Australian cases that separately provide guidance on topics of interest to the mining sector.

In the first, the court refused planning approval for a new open cut coal mine in the Gloucester Valley in New South Wales. The refusal was predominantly based on significant net negative social impacts. Greenhouse gas emissions and climate change also featured in the case and were said to be another reason for the refusal. But this case should not be seen as the end of new coal mines in New South Wales. If the particular circumstances of a coal project can establish significant benefits which outweigh negative impacts, then it should be still possible for such a project to be approved.

In the second, the implied duty of cooperation in commercial contracts was applied in the context of a provision requiring a payment for the achievement of a certain measured resource milestone. It was determined that the implied duty didn't necessarily require the exploration party to undertake drilling programs to achieve the milestone in the absence of some more concrete contractual obligation to do so.

In the third, the court implied a term dealing with the completion of a feasibility study in determining whether a company had completed the study and earned an interest in an exploration licence. The study provided was voluminous, but it was a prefeasibility study. The court held that this study fell short of the contracted feasibility study standard.

A more detailed analysis of each case can be found below.

## OPEN CUT COAL MINE PROPOSAL IN NEW SOUTH WALES REJECTED

The case of *Gloucester Resources Pty Ltd v Minister for Planning* [2019] NSWLEC 7 (8 February 2019) concerned an appeal in the Land and Environment Court of New South Wales against the Minister's refusal of a State significant development application for consent for the Rocky Hill Coal Project. The Project was a new open cut coal mine, in the Gloucester Valley in New South Wales, which would produce 21 million tonnes of coking coal over 16 years.

The Court on an appeal exercises the functions of the Minister as the consent authority to determine the application. Chief Judge Preston dismissed the appeal and determined the application by refusal of consent.

### Proposed Project Area

According to the Court, the proposed mine area is in the Gloucester Valley, which is a creature of a unique topographic feature. The valley is the floor of a nest comprising an alluvial plain through which the Avon River flows. The sides are forest-clad ranges east and west. The setting is scenic and serene.

### Statutory Framework

In determining whether to grant or refuse consent, the consent authority is required to take into consideration the likely impacts of the development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality, the suitability of the site for the development, submissions made, the public interest and any environmental planning instruments.

Such instruments include the State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2009 ("Mining SEPP"). The Mining SEPP provides that a coal mining development is permissible with consent notwithstanding any zoning restrictions or prohibitions.

Clause 12 of this Policy requires a consent authority to: consider any ways in which the development may be incompatible with existing, approved or likely preferred land uses; evaluate and compare the public benefits of the development and those land uses; and evaluate measures proposed to avoid or minimise any incompatibility.

### Minister's Refusal of Consent

The Minister's delegate, the Planning and Assessment Commission, refused consent for the following reasons:

- The creation and operation of the proposed coal mine within zones RU1 and E3 of the Gloucester Local Environmental Plan 2010 is in direct contravention of each zone's objectives.
- The residual visual impact of the mine would be significant throughout all stages of the Project.
- The Project is not in the public interest.

## Appeal Conclusions

The Chief Judge concluded after reviewing the evidence, including competing expert evidence, that consent for the Project should be refused for the following reasons:

- The Project, by reason of its visual, amenity and social impacts, will be incompatible with the existing, approved and likely preferred uses in the vicinity, and the measures proposed by the applicant will not avoid or minimize this incompatibility.
- Visual impact of the Project will be high—the proposed mine will have a high visual contrast with the surrounding landscape, and this will not be ameliorated by the proposed amenity barriers or the revegetation of the amenity barriers, permanent overburden emplacements or rehabilitated post-mining landforms.
- Noise impacts and air quality impacts were expected to fall within acceptable standards but there could still be social impacts arising from those impacts.
- Social impacts were assessed across nine categories, and it was found that the Project has significant negative social impacts on people's way of life, community, access to and use of infrastructure, services and facilities, culture, health and well-being, surroundings and fears and aspirations. The Project will also cause distributive inequity. While the Project has potential for positive social benefits, including for the local economy and employment, these benefits are outweighed by the significant negative impacts. The proposed mitigation measures will not be effective in mitigating these impacts. The significant net negative social impacts are a justification for refusing consent.
- The aggregate greenhouse gas ("GHG") emissions over the life of the Project are sizeable, and a refusal of consent would prevent a meaningful amount of GHG emissions. The GHG emissions and their likely contribution to adverse impacts on the climate system, environment and people adds a further reason for refusal.
- Proposed net economic benefits of the Project as determined by a cost benefit analysis and a local effects analysis are not significant and do not outweigh the negative impacts. As a result, the Project is contrary to the public interest.

## Implications

Climate change issues feature in the case, but the dominant issue was that significant net negative social impacts were not able to be mitigated.

This case does not mean that a coal mine proposal in New South Wales will never be approved. But for a project proponent to obtain consent for a coal mine proposal, the project must demonstrate significant net benefits and provide meaningful mitigation measures.

## IMPLIED DUTY TO CO-OPERATE IN MINING TENEMENT SALE AGREEMENT

The case of *Wellington v Huaxin Energy (Aust) Pty Ltd (formerly Cuesta Coal Limited)* [2019] QSC 18 (10 February 2019) included a consideration of the use of the implied duty to co-operate as a way to fill a gap in a contract.

### Facts

In November 2010, the plaintiffs entered into an agreement to sell to the defendants an exploration permit for coal EPC 1802 granted under Queensland Mineral Resources Act located in the Galilee Basin in Queensland. The proposed Adani Carmichael coal mine was 25 kilometres from the prospective part of the EPC.

The consideration for the sale was cash, shares and options in three tranches. The first and second tranche consideration was paid. The third tranche consideration of shares and options in the capital of a defendant valued at \$3 million was conditional on a third milestone being achieved within a five-year period. That milestone was a Measured Mineral Resource of 100 million tonnes of coal in the EPC area or 40 million tonnes of coal, depending on the circumstances.

The defendants undertook certain exploration work which resulted in an Inferred Mineral Resource of 364.1 million tonnes of coal being announced to the ASX on 29 October 2013. They then ceased exploration works to upgrade the mineral resource in the EPC area due to their own commercial reasons.

The initial EPC area comprised 130 sub-blocks over an area of 45,000 hectares. There would be relinquishments of sub-blocks over the years. The EPC holder was required as a condition of the permit to carry out a work program and comply with expenditure commitments of \$105,000 for year 1, \$100,000 for year 2 and \$210,000 for each of years 3 and 4.

The agreement did not expressly oblige the defendants to undertake exploration programs to achieve the third milestone.

### Claims

The plaintiffs claimed damages for breach of contract or specific performance of the contract.

They claimed amongst other things that:

- the sale agreement contained by implication an obligation on each party to do all such things as are necessary on its part to enable the other party to have the benefit of the contract, i.e., the third tranche shares and options upon the third milestone being achieved; and
- this obligation required the defendants to undertake exploration programs to achieve the milestone.

The plaintiffs' expert claimed that an additional 21-hole drilling program at a cost in the range of \$730,000 to \$1.1 million over a 70-day period, combined with a 90-day data analysis period, was required to achieve the milestone. The defendants' expert considered that such a program was a reasonable approach for a first stage of drilling to define a Measured Mineral Resource but that further drilling could be required due to uncertainties in exploration outcomes. The scope of work required to achieve the milestone was uncertain.

### Conclusions

The Court held that there was an implied duty to co-operate in the agreement and that the duty was for a party to do all things necessary to enable the other party to have the benefits of the agreement.

The agreement contained a further assurances clause to the effect that each party must do all things necessary to give full effect to the agreement. That clause did not create an obligation on the defendants to achieve the milestone. The

defendants submitted that the presence of this clause in the agreement excluded the duty to co-operate. The Court held that the duty to co-operate could co-exist with this clause.

However, the Court did not accept that the defendants has impliedly agreed, through the duty to co-operate, to undertake whatever work was necessary to achieve the milestone, as the scope of that work was uncertain and that would have amounted to an open-ended obligation.

Justice Jackson indicated that the duty may be limited by what work was reasonable in the circumstances, but this position was not put by the plaintiffs and no evidence was adduced on this point.

In the result, it was held that the plaintiffs failed to establish that the duty to co-operate required the defendants to undertake the 21-hole program because it was not established that such program would have achieved the milestone. The inherent uncertainty in the exploration process which created a potential open-ended obligation was a major consideration in this case.

### Implications

This case suggests that in general, the implied duty of co-operation applies in all commercial contracts. The content of the duty is that a party must do all things necessary to enable the other party to have the benefits of the agreement.

The main issue then is to determine the necessary things to be done. Where the benefit is a milestone and a plan of action will not necessarily achieve it, the obiter suggestion of Justice Jackson is to provide evidence of a reasonable plan of action on the basis that the duty to co-operate should encompass reasonably necessary things.

The plaintiff may have proceeded on the basis that it would be in the commercial interest of the defendants to achieve the milestone resource at contract date, but circumstances change over time. It will be advisable for parties to consider in contract negotiations and to expressly reflect in the contract what obligations a party is willing to take on to achieve a milestone.

## COMPLETED FEASIBILITY STUDY DEFINED WITHIN A CONTRACT FRAMEWORK

The case of *Pilbara Iron Ore Pty Ltd v Ammon* [2018] WASC 258 (24 August 2018) concerns the interpretation of provisions in a farm-in and unincorporated mineral exploration joint venture agreement relating to completion of a feasibility study, where that study was not defined and a party sought to imply a term to give the study a certain meaning.

### Contract Framework

Pilbara Iron Ore Pty Ltd (“PIO”) entered into the Mindy Mindy Farm-in and Joint Venture Heads of Agreement with Ammon on 3 September 2002.

The Heads gave PIO the right to earn an 80 percent interest in joint venture property which included exploration licence E47/1140 granted under the WA Mining Act located in the Pilbara region of Western Australia and owned by Ammon during the Earning Period.

The Earning Period commenced on the date of grant of the exploration licence (30 January 2003) and ended when PIO completed a feasibility study on the Tenements (i.e., the exploration licence) or five years from the grant date, whichever occurs sooner.

The term “feasibility study” was not defined, and there was no express criteria to determine completion of a feasibility study.

During the Earning Period, PIO was required to pay all outgoings and was required to maintain the Tenements. During the first 30 months of the Earning Period, PIO was to contribute not less than \$1 million to joint venture expenditure. Ammon was not required to contribute to any joint venture expenditure during this period.

If PIO failed to complete a feasibility study during the Earning Period, it was deemed to have withdrawn from the Joint Venture. If PIO completed a feasibility study during the Earning Period, it would be deemed to have acquired an 80 percent Joint Venture Interest.

Upon PIO earning the 80 percent Joint Venture Interest, PIO was to notify Ammon of this and then Ammon could elect within 90 days to contribute to the joint venture expenditure

or to withdraw from the Joint Venture. If Ammon elected to withdraw, then he was to first offer to transfer his Joint Venture Interest to PIO for the then-present value calculated by reference to the feasibility study and on other agreed terms. If the parties did not agree the terms within three months, then Ammon could sell to a third party.

If Ammon elected to contribute to joint venture expenditure, he had 12 months to raise project finance and in the meantime PIO would fund his share. If Ammon could not raise the project finance within the 12-month period, then his 20 percent Joint Venture Interest would convert to a 2.5 percent gross value for production royalty on all iron ore production from the Tenements, and the 20 percent interest would be transferred to PIO.

There was an operating committee which was empowered to make decisions in respect of programs and budgets and mining operations. This committee would decide if a mining operation is to proceed and the scope of that operation.

### SRK Document Provided

PIO sent an SRK document titled “Pilbara Iron Ore Pty Ltd Mindy Mindy Feasibility Study” to Ammon on 25 January 2008. The document was 168 pages in length and incorporated 26 appendices which ran to more than 2,000 pages. It presented a negative net present value for the project.

The SRK scope stated that the work completed by SRK—namely, hydrogeological, geotechnical and mining—are classed as being at Scoping or Pre-feasibility levels of accuracy. Reports were provided by other companies for other areas of the study. The resulting overall level of accuracy for the work completed by SRK could be classed as Pre-feasibility. SRK was not asked to include a reserve statement in the study.

Also, it was stated that SRK had not critically reviewed the reports prepared by other contractors and optimised the resource on financial input parameters supplied by others and did not verify the information supplied.

### Warden’s Court Proceedings

Ammon started proceedings in the warden’s court seeking a declaration that PIO was deemed to have withdrawn from the joint venture because the SRK document provided was not a completed feasibility study required by the contract.

Ammon claimed that a term should be implied, in the context of this contract framework, that to be a completed feasibility study, the study must:

- a) be accurate enough to enable Ammon to raise project finance;
- b) be independent, in that information provided by participants should be independently verified;
- c) be reliable, in that information should not be inaccurate or incomplete; and
- d) include a reserve statement to enable Ammon to seek to raise project finance.

Warden Wilson accepted this claim and implied the term in a preliminary issues hearing. He concluded that the purposes of the study within the contract framework included allowing Ammon to decide whether to withdraw from the joint venture or contribute to joint venture expenditure and to seek to raise project finance to meet contributions. The study had to be of a standard to meet those purposes without any limit on expenditure.

The warden then in a further hearing concluded on the expert evidence presented that the SRK document did not meet these requirements. He made the declaration that PIO was deemed to have withdrawn from the Joint Venture.

### Appeal

PIO appealed the warden's decision to the WA Supreme Court. The Court dismissed the appeal and confirmed the orders of the warden.

Justice Fiannaca was willing to imply the term for (a), (b) and (c) but not (d) and concluded, based on the expert evidence, that the SRK document did not meet those requirements.

There are three categories of studies—scoping study, prefeasibility study and feasibility study. The contract required a feasibility study. The SRK scope statements indicated that the

study was at pre-feasibility level and so did not meet the feasibility study level of accuracy and that SRK did not verify the significant data provided by PIO or its shareholders.

### Implications

This case does not provide a universal definition for a “feasibility study” but, in the context of this contract framework, which is quite common, it is a useful illustration of basic features of a feasibility study. It is preferable to define “feasibility study” in a contract.

### LAWYER CONTACTS

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