RECENT DEVELOPMENTS

COMMONWEALTH

CALCULATION OF BASELINE RENEWABLE ENERGY*

Pacific Hydro Limited & Ors v Office of the Renewable Energy Regulator [2006] FCAFC 39 (Tamberlin, Marshall and Jacobsen JJ) (28 March 2006)

Statutory interpretation – hydro-electric power station – Renewable Energy (Electricity) Regulations 2001 (Cth) – calculation of renewable energy baseline – modelling of station output in year in which generation started – whether to make allowances for losses and outages in start up phase

Background

This case was an appeal by Pacific Hydro Ltd and others (the applicants) to the Federal Court from a decision of the Administrative Appeals Tribunal (the Tribunal). The central issue in contention was the interpretation of the method of calculating the baseline amount of renewable energy for a power station. This baseline amount impacted on the number of renewable energy certificates (RECs), the Regulator would issue to the producer.

The applicants began construction of a dual-generator hydro-electric power station in January 1995. The two turbines were installed by January 1996, however one turbine was damaged and did not commence electricity generation until late April 1996. The undamaged turbine commenced electricity generation in March 1996. Between late April and late August 1996, both units seldom operated at the same time, and power generation was limited by approximately 40%. The communication system of the station was also not operating effectively, thus the station could not provide all the electricity it had capacity to generate until this was upgraded in late August. It was not until September onwards that the power station operated without problems.

Regulatory Framework

The Regulator is required to determine a baseline figure representing energy produced from renewable sources for each power station (Baseline). If a station generates more than this Baseline, the producer qualifies for a REC (issued by the Regulator) for every whole MWh over the Baseline. Certain purchasers of electricity must surrender a number of RECs for electricity acquired in a year. Where the purchaser does not have sufficient RECs, they are liable for a shortfall charge. A purchaser with too few RECs can purchase RECs from producers to avoid the liability to pay the shortfall.

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Relevant Legislative Provisions

The Regulator determines the Baseline based upon a station's output, according to the method set out in Schedule 3 to the *Renewable Energy (Electricity)* Regulations *2001* (Cth) (Regulations). In this instance, the Regulator applied clause 2.3(c) of Schedule 3, which states:

> … if the power station did not generate electricity continuously in 1994, 1995 and 1996, the Regulator may: …
>
> (c) if it started to generate electricity, or increased its generation capacity, in that period, model the output of the station over the year in which generation started or generation capacity increased.

The Dispute

The Regulator's Baseline figure was based upon the station's capacity for electricity output, not its actual output (which was substantially lower due to the turbine and communication system problems experienced from January until September). It was agreed by both parties that the Regulator used and ought to have used clause 2.3(c), as described above. It was also agreed that if the reduced actual output were taken into account, the Baseline would be 136,910 MWh, whereas if this were not taken into account, the Baseline would be 185,684 MWh. Over a ten year period, this difference would amount to more than $30 million. The applicants argued that in establishing the Baseline figure, regard should be had to the actual output of the station. The Regulator maintained that both it and the Tribunal had applied the calculation methodology correctly.

The Tribunal's Decision

The Tribunal's decision to exclude actual output from the method of establishing the Baseline was based on the following factors:

- If actual output was the sole factor, Schedule 3 would be rendered nugatory, as the *Regulations* already provide a formula for calculating the amount of renewable electricity generated in a year.
- The term "average" in clause 2.1 of the *Regulations*, while derived from actual output, indicates a notional amount in respect of the required three year period.
- The terms "model" in clause 2.3(c) and "extrapolation" used in clause 2.3(a)(i) further indicate a theoretical, rather than actual, figure.
- The term "capacity increase" was used in clause 2.3(c) rather than actual output, hence the appropriate focus was on the amount of power that could have been generated, as opposed to what was generated.
- The language of clause 3 also implies that the Baseline should be notional, rather than actual.

The Applicants' Contentions

The applicants contended that:

- The Tribunal had taken into account clause 3 as amended, when the parties had agreed that only the clause prior to the amendments was relevant, and thus had failed to accord due procedural fairness in failing to notify the parties.
- In determining the Baseline, the Regulator was required to take into account the "teething problems" experienced in the first year of operation.
- Modelling output from capacity was inconsistent with the wording of the legislation, as this amounts to modelling over a fictional year, rather than "model[ling] the output of the station over the year in which generation started" as required by the *Regulations*.
- The Court may have regard to the Explanatory Statement to the *Regulations*.
- Here, in relation to clause 2.3(c), the terms "installed capacity" and "capacity which was available" were used separately. There is a necessary distinction between the two, namely, that the phrase "capacity which was available" recognises possible teething issues where "installed capacity" did not.
- The applicants' proposed interpretation of clause 2.3(c) was in greater accordance with Parliament's objective of encouraging production of electricity from renewable sources. If the Baseline were set to a lower figure, there would be more certificates issued and thus applicants would have greater funds available to further invest in renewable energy.

The Court's Decision

The procedural fairness argument was rejected, as the Tribunal had made it clear that their interpretation of clause 2.3(c) was the same whether or not the clause had been amended (or even existed).

The Court affirmed the principle from *Project Blue Sky v Australian Broadcasting Authority*[1] that the "Court should attempt to give a meaning to each of the words used [in a statute] so as not to render any of the language unnecessary."[2]

The Court agreed with the applicants' submissions as to its ability to refer to extrinsic material, and affirmed the principle that there is no longer any necessity to establish statutory ambiguity before resort is had to such material. Citing *CIC Insurance v Bankstown Football Club Ltd*[3], with approval that the "modern approach" to statutory interpretation:

> (a) insists that the context be considered *in the first instance*, and not merely at some later stage when ambiguity might be thought to arise, and (b) *uses 'context' in its widest sense* to include such things as the existing state of the law and the mischief which, by legislative means such as those just mentioned, one may discern the statute was intended to remedy….[I]f the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and the objects of the legislation, they may wear a very different appearance. Further, inconvenience or improbability of result may assist the Court in preferring to the literal meaning an alternative construction

1 (1998) 194 CLR 355
2 [2006] FCAFC 39 at [8]
3 (1997) 187 CLR 384 at 408

> which… is reasonably open and more closely conforms to the legislative intent. (Emphasis added)

The Court confirmed that it may also refer to reports of law reform bodies for this purpose.

The Court disagreed, however, with the applicants' submission as to the correct interpretation of the Explanatory Statement. The reference to "capacity which was available" is intended to be an estimation of the "ordinary capacity of the station when it was operating normally and after the outages and problems had been eliminated."[4]

The Court also disagreed that the applicants' interpretation was in greater accordance with the objectives of the Act than the respondent's. If the applicants' interpretation were to be accepted, inefficient planning and mismanagement would result in a greater entitlement for an operator compared with an operator who has carefully planned and efficiently implemented the initial operation.

SOUTH AUSTRALIA

MINING CLAIM DECLARED INVALID*

Boral Resources (SA) Ltd v Matthews [2006] SASC 121 (Supreme Court of South Australia, 28 April 2006, Doyle CJ, Bleby and White JJ)

Mining claim – Marking out

Facts and Legislative Background

In February 2004 Boral Resources (SA) Pty Ltd instructed a surveyor to peg a mineral claim over a reserve known as the former Mount Monster Quarry. Boral held a miner's right over the area issued under s 20 of the *Mining Act 1971* (SA). Regulations 13 and 14 of the *Mining Regulations 1998* (SA) govern the pegging of a mineral claim. Regulation 13 provides that the shape of a mineral claim must, as far as practicable, approximate a rectangle. Subregulation 14(2) provides that a post must be securely placed in the ground at the corner of the relevant area. Subregulation 14(4) provides that the direction of the boundaries of the claim must be clearly indicated by trenches, piles of stones, or substantial indicator markers fixed to each post. Subregulation 14(5)provides that if it is impracticable to comply with any preceding subregulation (which include subregulations 14(2) and 14(4)) then a person can peg out a mineral claim in some other manner but in accordance with subregulation 14(6) the person must lodge an appropriate notice within seven days after the pegging. The notice must outline the actual manner of the pegging.

The surveyor engaged by Boral, Mr Whitney, pegged Boral's claim on 26 February 2004 but he did not place a post in two corners of the mineral claim area. In evidence Mr Whitney said that scrub on the land prevented him achieving a line of sight to the corners that he did not peg. In

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4 at [10].

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