- no market existed for the carbon credits required by HEL's condition
- the withdrawal of the claim for a condition to offset scope 3 emissions at the close of submissions was unreasonable conduct.

Decision

The Court dismissed the application for costs. It ordered that Ulan pay HEL's costs of the costs hearing.

Reasoning

Costs generally

- The starting point in class one merits appeals is that each party pay its own costs unless it is fair and reasonable in the circumstances of a particular case that costs should be awarded: Rule 3.7(2).
- Individuals and corporations who challenge a decision in merits appeal proceedings do not have the same obligations as a consent authority. There are no restrictions in s 75L on how an objector is to run an appeal, issues it must consider, or a requirement to consider the economic impact of the conditions it seeks.
- A third party objector to a Part 3A project can bring forward any issues it considers are insufficiently considered in the minister's assessment, provided these are rational and supported by adequately qualified expert evidence where this is needed. A third party objector's concerns are not defined by matters considered by the minister in approving the project.

Whether the applicant should have sought and maintained the GHG offset condition

- In the absence of policy or legislative framework on the issue of GHG emissions (at the time of the initial hearing), it was not unreasonable or irrational for HEL to suggest that the environmental impacts of GHG emissions could be addressed by a condition requiring offsets.
- The pursuit of an offset of scope 3 emissions was not unreasonable because Ulan was required to address scope 1, 2 and 3 emissions as part of the environmental assessment process. HEL's decision to later abandon scope 3 emissions in light of evidence that arose during the hearing was also reasonable.

HEL's claims were continually supported by expert evidence and therefore its decision to continue to seek GHG offset conditions was reasonable. Ulan should not be compensated for having to respond to such a condition.

Economic Impact

Ulan argued that the economic impact of the offsets through carbon credit purchase would render the project unviable and, therefore, it was unreasonable to press a condition requiring purchase of carbon credits. The Court disagreed, concluding that the economic viability of a particular proposal was not a material relevant consideration in environmental assessment under Part 3A. HEL was not bound to consider the economic impacts of its proposed offset conditions.

Whether the applicant should have sought and maintained its refusal of the project based on greenhouse gas emissions

The Court held that HEL did not act unreasonably or irrationally in proposing that the project be refused on the basis of its GHG emissions, noting that:

- The project involved significant expansions to production which would in turn result in significant emissions. It was also the first time such an issue was advanced in merits appeal proceedings.
- It may be fair and reasonable to award costs where a change of position in Class one proceedings results in costs being thrown away. However, in this case HEL acted responsibly when it abandoned its claim for refusal of the project.

Reysson Pty Limited v Roads and Maritime Services [2012] NSWLEC 17

by Penny Murray

Roads and Maritime Services ('RMS') compulsorily acquired land owned by Reysson Pty Limited. As a preliminary issue in the proceedings, because it would affect the market value of the land and Reysson's entitlement to compensation, the parties sought a declaration from the court as to whether a development consent for a staged 34

lot residential subdivision ('the consent') on a substantial part of the resumed land had lapsed by virtue of no 'building, engineering or construction work' having been 'physically commenced' on the land to which the consent applies, before the lapsing date.

Before the lapsing date, the following works were physically commenced:

- surveying and related work conducted on behalf of the applicant
- construction of a roundabout next to the vehicle access road to the subdivision, which was required as a condition of consent but was carried out by Tweed Shire Council under a separate development consent
- land clearing and bulk earthworks conducted on behalf of the applicant.

Justice Biscoe declared that the consent had not lapsed because engineering works had been carried out before the lapsing date.

Survey work

Reysson submitted that by reason of the survey work, engineering work relating to the subdivision had been physically commenced. The survey works were necessary in order to produce the detailed engineering drawings required under the conditions of the consent. The RMS argued that the survey work was not 'engineering works' within the meaning of the *Environmental Planning and Assessment Act 1979* (the Act) and was done in breach of condition 9 of the consent which stated 'Under no circumstance shall engineering works commence prior to approval of a complete set of engineering drawings'.

The Court noted that development consents are to be construed

> ... not as documents drafted with legal expertise, but to achieve practical results. Conditions are intended to achieve something substantive and should be construed, if possible, so as to give effect to that intention and to avoid uncertainty.[87]

Considering these principles, the Court found there were good reasons for concluding that the expression 'engineering works' in condition 9 did not include survey work, notwithstanding that 'engineering ... work' in the Act does. The judge noted that if engineering works in condition 9 included surveying, then it would be impossible to comply with condition 9 because a complete set of engineering drawings it required could not be produced until surveying is done. Justice Briscoe said: '[t]o interpret otherwise, even literally, would not be sensible.' Secondly, the judge considered that the different purposes and contexts of s 99 (now s 95) and the condition suggest that the phrase 'engineering works' had different meanings. In the judge's view, s 99(4) is a drag-net provision capturing all kinds of works that are likely to be relevant to demonstrating whether development has in fact commenced. In contrast, condition 9 is a management condition to prevent works, which by their nature require engineering drawings, from being commenced without the Council's prior approval of a complete set of engineering drawings. Survey work, his honour said, does not require engineering drawings, let alone approval of engineering drawings. It does not even require development consent. With these considerations, an alternative available construction of condition 9 was that Council must be taken to have intended to authorise work necessary for compliance with condition 9.

Roundabout work

Condition 37 of the consent required the construction of the roundabout and vehicular access. The approved plans relating to the roundabout were only conceptual, without any design details. The judge noted that condition 37 did not preclude obtaining a further development consent for the roundabout if that was necessary but considered that conditions of consent may require things to be done that require further development consent or approvals and that that was the case with the roundabout given that it was only shown conceptually. Before the lapsing date, the Council granted conditional development consent to itself to construct the roundabout and Reysson contributed land and costs to Council for the construction of the roundabout. The RMS argued that the roundabout works could not be relied upon to prevent lapsing of the consent because it was authorised by a different consent or, alternatively, the roundabout work involved 'engineering work' and was therefore done in breach of condition 9.

The judge considered that although the approved development was for subdivision and not the adjacent roundabout, the roundabout work nevertheless related to the approved development because it was referenced in the consent conditions. Further, the roundabout works were not in breach of condition 9 because the engineering works referred to in that condition are engineering works for the development the subject of the subdivision consent, not the roundabout consent.

87 [2012] NSWLEC 17, [26].

Non-compliant earthworks

Prior to the lapsing date the applicant carried out earthworks. The RMS argued that those works had been done in breach of condition 9 because Council had only approved plans for parts of the development, but not all of the development at the time the works were done. The applicant argued that condition 9 was inapplicable because it should be construed as applying to each phase of the development, including bulk earthworks which had been approved by Council.

The judge was not inclined to read down condition 9 so that it applied only to each phase of the works, including bulk earthworks, because it was unjustified and did undue violence to its terms. The references to stages in the consent did not refer to earthworks and even if it did, the judge did not think that it was acceptable to read down condition 9 so as to refer only to each stage because it used the phrase '[a] complete set of engineering drawings' and does not refer to stages, whereas other conditions referred to engineering plans for particular stages. Despite being engineering works, they were carried out before a complete set of engineering drawings were approved and could not be relied upon to evidence physical commencement of the consent.

QUEENSLAND

Xstrata Coal Queensland Pty Ltd and Ors v Friends of the Earth-Brisbane Co-Op Ltd and Ors, and Department of Environment and Resource Management [2012] QLC 013

by Dr Justine Bell

Background

The applicants had applied for three mining leases and a related environmental authority to operate an open-cut coal mine west of Wandoan. The proposal involved mining activities at a rate of 30metric tonnes ('Mt') per annum for 35 years, plus associated infrastructure.

The proposal was declared to be a 'significant project' under the *State Development and Public Works Organisation Act 1971* (Qld). It was also declared to be a 'controlled action' under the EPBC Act. It was assessed by the Queensland Coordinator-General, who ultimately recommended that the project be approved, subject to conditions. It was subsequently approved by the Commonwealth minister, and a draft environmental authority was prepared incorporating the recommended conditions.

Under s 268 of the *Mineral Resources Act 1989* (Qld) ('MRA'), the Land Court is required to hear applications for a mining lease and any objections thereto. The Land Court is then required to make a recommendation as to whether the application be granted, including any conditions (s 269). The Land Court is also required to hear any objections to the grant of the environmental authority, and make a recommendation as to whether it should be granted (*Environmental Protection Act1994* (Qld) ('EPA') ss 216–23).

There were two main categories of objections in the case. A group of neighbouring landholders made objections regarding the size of the mine, and its impact on their land. Objections were also made by the environmental group Friends of the Earth ('FoE') based on the climate change impacts of the proposal.

This case note briefly summarises the responses to the landholders' objections, but focuses mainly on the climate change issues. There were also a number of issues dealt with by the Court, which will not be addressed.

Landholders' objections

The majority of the landholders' objections were dismissed, including that:

- the draft environmental authority ('EA') was released prior to the Commonwealth minister deciding whether to approve the controlled action; the Court held that there was nothing in the relevant legislation which required the administering authority to defer issuing a draft EA (mining lease) until after the Commonwealth minister had made a decision
- the applicant had not given valid reasons why a mining lease should be granted in respect of the area and shape of the land described in the lease. The applicant had applied for the mining lease to cover additional land to create a buffer zone between mining activities and other land. The Court held that, as a matter of construction of the MRA, the area of a mining lease could include an environmental buffer
- the objectors said that only about 11 000ha of the total area of 32 000ha originally applied for would be used for mining operations, which would adversely impact on food production. The Court held that the applicant had given good reasons for requiring the land