Barrick Australia Ltd v Williams [2009] NSWCA 275

Requests to modify Part 3A projects under s75W of the Environmental Planning and Assessment Act 1979

Elaine Johnson*

BACKGROUND

This case was an appeal brought by Barrick Australia Ltd (**Barrick**) from the judgment of Justice Biscoe of the NSW Land and Environment Court (**LEC**) in respect the proposed expansion and intensification of its gold mining operations at Lake Cowal in NSW, including an extension of the life of the mine by 11 years.[1] The original LEC proceedings were brought by Mr Neville "Chappie" Williams, who is a Wiradjuri Traditional Owner, custodian and native title claimant in respect of the land and waters on which the Cowal Gold Mine is located. The mine has been the subject of intense and ongoing community concern since its inception for a number of reasons. The proposed expansion, if approved, is likely to have substantial environmental consequences, and to impact further on the cultural significance of the land and water on which the mine is located.

The EDO acted for Mr Williams in these Court of Appeal proceedings, and would like to thank Mr Williams' barristers in this matter, Dr Sarah Pritchard and Mr Bret Walker SC.

LAND AND ENVIRONMENT COURT

In the LEC, Mr Williams was appealing against a request by Barrick lodged with the Director-General of the Department of Planning (**DG**) for approval to modify its existing operations at the Cowal Gold Mine under s75W of the *Environmental Planning and Assessment Act 1979* (**EPA Act**). Section 75W confers power on the Minister for Planning (**Minister**) to grant approval for the "modification" of an existing Part 3A project approval.

Mr Williams was represented in the LEC by Mr Al Oshlack of the Indigenous Justice Advocacy Network. The LEC proceedings were brought on several grounds. Relevantly, for the purposes of the appeal, Biscoe J held that the request made by Barrick to the DG was not a request to modify within the meaning of s75W, as the proposed changes were more than a mere modification, and constituted a "radical transformation" of the existing project. Biscoe J made various orders, including an order restraining the Minister from determining Barrick's request under s75W.

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* The author was the EDO's solicitor in this appeal representing the Respondent, Mr Neville "Chappie" Williams, and is currently working as an EDO volunteer with the Public Solicitor's Office, Solomon Islands through the Australian Youth Ambassadors for Development program.

[1] *Williams v Minister for Planning* [2009] NSWLEC 5; 164 LGERA 204.

COURT OF APPEAL

The "radical transformation" test set out by Biscoe J in the LEC was the focus of the appeal by Barrick, however ultimately the Court of Appeal determined the matter on a preliminary issue relating to jurisdictional fact. The Court (Basten JA, McColl JA agreeing) held that although a request to modify is a precondition to the exercise of power under s75W, the language, statutory context and purpose of s75W indicate that the assessment of whether the request extends beyond the scope of s75W is to be made by the Minister, not by the courts. The Court also found that there is an implicit obligation on the Minister to determine whether a request falls within s75W.

The appeal therefore turned on this preliminary issue, and as the Court found in favour of the Appellant on this point, it did not need to decide upon the substance of the question addressed by Biscoe J. However, Basten JA (Mc Coll JA agreeing) did make some general comments on factors which may influence the interpretation of what constitutes a modification of an approval, being:

1. Part 3A of the EPA Act is defined by reference to major infrastructure projects;
2. Part 3A projects are required to undergo environmental assessment and public consultation of a kind that is not required for modifications under s75W, which suggests that the modification of an approval was intended to have limited environmental consequences;
3. The consent authority for modifications is the Minister, which may suggest that the purpose of s75W was to permit decision-makers to have regard to State or regionally significant matters.

In particular, it is noted that Basten JA (McColl JA agreeing) made the following comments at [53], which are useful in indicating the restricted nature of modifications:

> Construing s75W in its context, it is clear that the modification of an approval was something intended to have limited environmental consequences beyond those which had been the subject of assessment.

So although the Court of Appeal has overturned Biscoe J's LEC decision which applied the "radical transformation" test to Part 3A modifications, it has recognised that the legislature intended s75W modifications to have limited environmental consequences beyond those already approved.

This is important, because under s75W of the EPA Act there is no mandatory environmental assessment, consultation or report under ss75F-75I of the EPA Act, as there is for a fresh Part 3A project application (however adequate, or otherwise, that process may be). Accordingly, if the power to modify a Part 3A approval under s75W is not confined to cases with only limited environmental consequences, large-scale "modifications" could be approved outside of that assessment process altogether. In turn, this reduces accountability of decision-makers, where significant changes might be approved in the absence of a legislative framework for environmental assessment.