

## AMENDED POINTS OF CLAIM

### COURT DETAILS

Court	The Land and Environment Court of New South Wales
Registry	225 Macquarie Street, Sydney
Case number	40500 of 2009

### TITLE OF PROCEEDINGS

First Applicant	<b>Peter Robert Gray</b>
Second Applicant	<b>Naomi Crystal Hodgson</b>
Respondent	<b>Macquarie Generation</b>

### FILING DETAILS

Filed By	<b>Peter Robert Gray and Naomi Crystal Hodgson</b> Applicants
Legal representative	Kirsty Ruddock, the Environmental Defender's Office
Legal representative reference	13359
Contact name and telephone	BJ BeomJin Kim (02) 9262 6989

### THE APPLICANTS CLAIM THAT:

- 1 The First and Second Applicants are:
  - (a) natural persons; and
  - (b) activist members of Rising Tide Australia, a non-profit grass roots community group that has campaigned on the issue of climate change since 2004, particularly in relation to coal-fired power generation in the Hunter region in New South Wales (NSW).
- 2 Macquarie Generation is and was at all material times:
  - (a) a corporation constituted by the *Energy Services Corporation Act 1995* (NSW) (ESC Act);
  - (b) pursuant to s 4 of the ESC Act, a state owned corporation under the *State Owned Corporations Act 1989* (NSW); and
  - (c) able to sue or be sued in its corporate name.
- 3 At all material times Macquarie Generation carried on the business of the wholesale generation of electricity, in particular, the generation of electricity from a coal-fired

power station known as the Bayswater Power Station situated at New England Highway, Muswellbrook, NSW (**Bayswater Power Station**).

- 4 Macquarie Generation is and was at all material times the holder of premises-based environment protection licence No 779 (**the Environment Protection Licence**) issued under the *Protection of the Environment Operations Act 1997* (NSW) (**the Act**) in respect of its electricity generation activities at Bayswater Power Station.

#### **Particulars**

- (a) The Environment Protection Licence applied and continues to apply to the premises of Bayswater Power Station located at New England Highway, Muswellbrook, NSW comprising part Lot 15 DP 848095 and Lot 6 DP 247943.
- (b) The Environment Protection Licence relates to three scheduled activities: Electricity Generation; Waste Activities; and Waste Facilities – coal wash landfill.
- 5 Macquarie Generation is and was at all material times the owner of Bayswater Power Station.
- 6 Macquarie Generation is and was at all material times the occupier of Bayswater Power Station.
- 7 Macquarie Generation is and was at all material times the operator of Bayswater Power Station.
- 8 Macquarie Generation has and had at all material times the management of Bayswater Power Station.
- 9 Macquarie Generation has and had at all material times the control of Bayswater Power Station.
- 10 Macquarie Generation has generated electricity at Bayswater Power Station through the burning of coal since on or about 1 March 1996 and proposes to continue to do so by operating Bayswater Power Station.

#### **Carbon dioxide and greenhouse gases**

- 11 Carbon dioxide (CO<sub>2</sub>):
- (a) is a gaseous substance;
- (b) is one of the greenhouse gases;
- (c) once emitted, remains in the atmosphere for, on average, approximately 100 years; and
- (d) once emitted, is dispersed throughout the global atmosphere.

## Global warming

- 12 The global climate is currently undergoing an overall warming.
- 13 Warming of the climate is evident from observations of:
- (a) increases in global average air and ocean temperatures;
  - (b) widespread melting of snow and ice; and
  - (c) rising global average sea level.
- 14 Most of the observed increase in global average temperatures since the mid-20<sup>th</sup> century is very likely due to the observed increases in atmospheric concentrations of anthropogenic greenhouse gases.
- 15 Observed changes to other aspects of the climate, including temperature extremes, rainfall extremes, and atmospheric humidity, have also been attributed to increased atmospheric concentrations of anthropogenic greenhouse gases. Changes to the climate due to anthropogenic activities that lead to increases in the major greenhouse gases in the atmosphere are hereinafter referred to in these points of claim as **"global warming"**.
- 16 The observed increase in atmospheric concentrations of anthropogenic greenhouse gases, causing global warming, is a result of the cumulative emissions of anthropogenic greenhouse gases including CO<sub>2</sub>.
- 17 CO<sub>2</sub> is the principal greenhouse gas affected by anthropogenic processes.
- 18 Anthropogenic emissions of CO<sub>2</sub> represented 77% of total anthropogenic greenhouse gas emissions in 2004.
- 19 Anthropogenic emissions of CO<sub>2</sub> currently make the largest contribution to global warming of all the known anthropogenic causes.
- 20 Global warming:
- (a) is likely to have caused temperatures to increase across Australia including NSW since the middle of the 20<sup>th</sup> century;
  - (b) may have caused changes to other aspects of the climate across Australia including temperature extremes and intensified droughts;
  - (c) has affected many natural systems including hydrological, marine, freshwater, and terrestrial systems;
  - (d) has probably caused a decline in snow cover in the Australian Alps; and

(e) is projected to cause future impacts on the environment across Australia including NSW, such as:

- (i) increased annual-average temperatures and number of hot days;
- (ii) a tendency towards decreased rainfall in southern Australia;
- (iii) increased drought frequency over most of Australia; and
- (iv) a substantial increase in fire risk in south-eastern Australia.

21 Continued greenhouse gas emissions at or above current rates would cause further global warming and cause changes in the climate during the 21<sup>st</sup> century that would very likely be larger than those observed during the 20<sup>th</sup> century.

#### **Increased ocean acidification**

22 The increased concentration of anthropogenic CO<sub>2</sub> in the atmosphere has also caused increased acidification of ocean waters (**increased ocean acidification**).

23 Increased ocean acidification:

- (a) is expected to have negative impacts on marine shell-forming organisms and their dependent species by affecting the process of calcification, by which marine organisms such as corals and molluscs make shells; and
- (b) has already caused reduced calcification of marine shell-forming organisms in the Southern Ocean and on the Great Barrier Reef.

#### **Coal-fired power stations and carbon dioxide**

24 The primary source of the increased concentration of CO<sub>2</sub> in the atmosphere since the pre-industrial period is the combustion of fossil fuels.

25 The combustion of coal accounts for around 42% of global CO<sub>2</sub> emissions from fuel combustion (28,002 mega tonnes of CO<sub>2</sub> (**Mt CO<sub>2</sub>**)).

##### **Particulars**

International Energy Agency, *CO<sub>2</sub> Emissions from Fuel Combustion*, 2008

26 The combustion of coal accounts for around 57% of Australian CO<sub>2</sub> emissions from fuel combustion (394 Mt CO<sub>2</sub>).

##### **Particulars**

International Energy Agency, *CO<sub>2</sub> Emissions from Fuel Combustion*, 2008

- 27 Globally, coal-fired electricity and heat production accounts for over 60% of CO<sub>2</sub> emissions from coal combustion.

**Particulars**

International Energy Agency, *CO<sub>2</sub> Emissions from Fuel Combustion*, 2008

- 28 In Australia, coal-fired electricity and heat production accounts for over 90% of CO<sub>2</sub> emissions from coal combustion.

**Particulars**

International Energy Agency, *CO<sub>2</sub> Emissions from Fuel Combustion*, 2008

**Carbon dioxide emissions from Bayswater Power Station**

- 29 Bayswater Power Station has the highest annual CO<sub>2</sub> emissions (tonnes CO<sub>2</sub>) of all power stations in NSW.
- 30 From 1 July 2001 to 30 June 2008, Bayswater Power Station emitted:
- (a) 13.3 to 15.6 Mt CO<sub>2</sub> annually;
  - (b) an average of 14.7 Mt CO<sub>2</sub> annually; and
  - (c) a total of over 100 Mt CO<sub>2</sub>.

**Particulars**

Macquarie Generation Annual Reports from 2002 to 2008

- 31 In 2007, CO<sub>2</sub> emissions from Bayswater Power Station (13.3 Mt CO<sub>2</sub> in 2007) were approximately:
- (a) 8% of the total NSW greenhouse gas emissions (162.7 Mt CO<sub>2</sub>-equivalents); and
  - (b) 2% of the total Australian greenhouse gas emissions (547 Mt CO<sub>2</sub>-equivalents).

**Particulars**

Department of Climate Change, *Australian National Greenhouse Accounts - National Greenhouse Inventory 2007*, 2009

- 32 In 2004, CO<sub>2</sub> emissions from Bayswater Power Station (15.1 Mt CO<sub>2</sub> in 2004) represented approximately 0.03% of global greenhouse gas emissions (49,000 Mt CO<sub>2</sub>-equivalents in 2004).

**Particulars**

*IPCC, Climate Change 2007: Mitigation of Climate Change. Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change, 2007*

- 33 Macquarie Generation proposes or threatens to continue to emit CO<sub>2</sub> at Bayswater Power Station, at similar levels, indefinitely.

**Particulars**

*Macquarie Generation, Statement of Corporate Intent, 2008/2009*

- 34 CO<sub>2</sub> emissions from Bayswater Power Station have increased the atmospheric concentration of anthropogenic CO<sub>2</sub>.
- 35 If CO<sub>2</sub> emissions from Bayswater Power Station are continued as proposed or threatened by Macquarie Generation, those emissions will continue to increase the atmospheric concentration of anthropogenic CO<sub>2</sub>.

**Waste**

- 36 From at least 1 January 2002 to 26 July 2009 (**Relevant Period**) the emissions of CO<sub>2</sub> described in paragraph 30 above from Bayswater Power Station have:
- (a) dispersed throughout the atmosphere;
  - (b) accumulated in the atmosphere;
  - (c) increased the atmospheric concentration of anthropogenic CO<sub>2</sub> in the atmosphere; and
  - (d) altered the environment.
- 37 If continued as proposed or threatened by Macquarie Generation, CO<sub>2</sub> emissions from Bayswater Power Station will continue to:
- (a) be dispersed throughout the atmosphere;
  - (b) accumulate in the atmosphere;
  - (c) increase the atmospheric concentration of anthropogenic CO<sub>2</sub> in the atmosphere; and
  - (d) alter the environment.

38 In the premises:

- (a) the CO<sub>2</sub> that has been emitted into the air or atmosphere at Bayswater Power Station by Macquarie Generation in the Relevant Period; and
- (b) the CO<sub>2</sub> that Macquarie Generation proposes or threatens to continue to emit into the air or atmosphere at Bayswater Power Station,

is or will be "waste" within the meaning of paragraph (a) of the definition of that term contained in the Act because it has caused or will cause an alteration in the environment.

39 Further or alternatively:

- (a) the CO<sub>2</sub> that has been emitted at Bayswater Power Station by Macquarie Generation in the Relevant Period; and
- (b) the CO<sub>2</sub> that Macquarie Generation proposes or threatens to continue to emit into the air or atmosphere at Bayswater Power Station,

is or will be "waste" within the meaning of paragraph (b) of the definition of that term contained in the Act because it is or will be a discarded, rejected, unwanted, surplus or abandoned substance.

#### **Particulars**

- (a) CO<sub>2</sub> is produced when coal is burned in the presence of oxygen. It is a by-product of electricity generation in coal-fired power stations.
- (b) At Bayswater Power Station, CO<sub>2</sub> is emitted or discharged through four emission stacks.

#### **Disposed**

40 The CO<sub>2</sub> emissions referred to in paragraphs 30 to 33 above were or will be emitted into the air or atmosphere at Bayswater Power Station by Macquarie Generation.

41 Further or alternatively, the CO<sub>2</sub> emissions referred to in paragraphs 30 to 33 above were or will be discharged into the air or atmosphere at Bayswater Power Station by Macquarie Generation.

42 In the premises, the CO<sub>2</sub> emissions referred to in paragraphs 30 to 33 above were or will be "disposed" of for the purposes of s 115 of the Act, in the sense that they were or will be emitted or discharged.

### **Harm to the environment**

- 43 The CO<sub>2</sub> that has been emitted into the atmosphere at Bayswater Power Station by Macquarie Generation in the Relevant Period has indirectly altered the environment with the effect of degrading the environment, by increasing the atmospheric concentration of anthropogenic CO<sub>2</sub> which, in turn, has contributed to:
- (a) global warming and the matters described in paragraph 20 above; and
  - (b) increased ocean acidification and the matters described in paragraph 23 above.
- 44 Further or alternatively, it is likely that the CO<sub>2</sub> that has been emitted into the atmosphere at Bayswater Power Station by Macquarie Generation during the Relevant Period has indirectly altered the environment with the effect of degrading the environment by increasing the atmospheric concentration of anthropogenic CO<sub>2</sub> which, in turn, has contributed to:
- (a) global warming and the matters described in paragraph 20 above; and
  - (b) increased ocean acidification and the matters described in paragraph 23 above.
- 45 Further or alternatively, the emission of CO<sub>2</sub> from Bayswater Power Station by Macquarie Generation during the Relevant Period resulted in or was likely to result in "pollution" within the meaning of the Act.
- 46 In the premises, Macquarie Generation has emitted CO<sub>2</sub> into the atmosphere at Bayswater Power Station in the Relevant Period in a manner that harms or is likely to harm the environment within the meaning of s 115 of the Act.
- 47 If Macquarie Generation continues to emit CO<sub>2</sub> into the air or atmosphere at Bayswater Power Station as proposed or threatened, those emissions will continue to harm or be likely to harm the environment in the manner described in paragraphs 43 to 46 above.

### **Willful or negligent**

- 48 Macquarie Generation was aware during the Relevant Period that it was emitting CO<sub>2</sub> into the atmosphere from Bayswater Power Station.

### **Particulars**

Macquarie Generation Annual Reports from 2002 to 2008

- 49 Macquarie Generation is aware that its ongoing operations will result in it continuing to emit CO<sub>2</sub> into the atmosphere from Bayswater Power Station.

**Particulars**

*Macquarie Generation, Statement of Corporate Intent, 2008/2009*

- 50 Macquarie Generation was aware that emission of CO<sub>2</sub> in the manner alleged in paragraphs 30 to 32 above would cause the harm or likely harm to the environment referred to in paragraphs 43 to 46 above.
- 51 Further or in the alternative, Macquarie Generation was recklessly indifferent to the harm or likely harm to the environment referred to in paragraphs 43 to 46 above.
- 52 Further or in the alternative, the harm or likely harm to the environment referred to in paragraphs 43 to 46 above was reasonably foreseeable for a corporation in the position of Macquarie Generation.
- 53 If Macquarie Generation continues to emit CO<sub>2</sub> into the air or atmosphere at Bayswater Power Station as proposed or threatened it will do so in circumstances where:
- (a) Macquarie Generation is aware that it will cause the harm or likely harm to the environment referred to in paragraph 47 above;
  - (b) Macquarie Generation is recklessly indifferent to the harm or likely harm to the environment referred to in paragraph 47 above; or
  - (c) the harm or likely harm to the environment referred to in paragraph 47 above would be reasonably foreseeable for a corporation in the position of Macquarie Generation.

**Lawful authority**

- 54 At all material times, Macquarie Generation has not had lawful authority to emit CO<sub>2</sub> at Bayswater Power Station.

**Particulars**

- (a) CO<sub>2</sub> is not included in the types of waste the disposal of which are authorised by the Environmental Protection Licence.
- (b) Macquarie Generation does not otherwise have any lawful authority to emit CO<sub>2</sub> at Bayswater Power Station.

54A Further or in the alternative, even if Macquarie Generation has lawful authority to emit CO<sub>2</sub> at Bayswater Power Station, it is only authorised to emit CO<sub>2</sub> in a manner that has reasonable regard and care for:

- (a) the interests of other persons; and/or
- (b) the environment.

**Particulars**

If Macquarie Generation has lawful authority to emit CO<sub>2</sub>, which is denied, the limits on that authority are to be implied from the Environmental Protection Licence.

54B At all material times, Macquarie Generation has emitted CO<sub>2</sub> at Bayswater Power Station in a manner that fails to have reasonable regard and care for:

- (a) the interests of other persons; and/or
- (b) the environment.

and as such the emissions of CO<sub>2</sub> at Bayswater Power Station by Macquarie Generation have been without lawful authority.

**Particulars**

The Applicants refer to and repeat paragraphs 43 to 46 of the Points of Claim.

**Relief sought**

55 The Applicants seek the relief sought in the Amended Summons dated 21 August 2009.

**NOTICE OF AMENDMENT: UCPR 19.5**

- 1 This document is amended on 2009 pursuant to leave granted by the Court on 2009.
- 2 New information is in underlined text.

**SIGNATURE**

Signature of legal representative

*F. Millner*

Capacity

Solicitor on the record by her employed solicitor,  
Felicity Millner

Date of signature

*20 November* 2009