

NEW SOUTH WALES LAND AND ENVIRONMENT COURT

Ulan Coal Mines Ltd v Minister for Planning and Another

[2008] NSWLEC 185

Preston J

2, 3 June 2008

Development Consent — Uncertainty — Conditions — Approval of coal mining project — Uncertainty as to availability of water supply for project — Condition of approval to ensure sufficient water for project and if necessary adjust scale of mining operations to match water supply — Whether condition within power — Whether condition lacked certainty or finality — Environmental Planning and Assessment Act 1979 (NSW), ss 75F, 75G, 75I, 75J, 80, 80A.

Development Consent — Conditions — Approval of coal mining project — Uncertainty as to availability of water supply for project — Condition of approval to ensure sufficient water for project and if necessary adjust scale of mining operations to match water supply — Whether condition caused significantly different development — Whether condition within power — Environmental Planning and Assessment Act 1979 (NSW), ss 75F, 75G, 75I, 75J, 80, 80A.

Administrative Law — Restraining orders — Unreasonableness — Approval of coal mining project — Uncertainty as to availability of water supply for project — Condition of approval to ensure sufficient water for project and if necessary adjust scale of mining operations to match water supply — Environmental Planning and Assessment Act 1979 (NSW), ss 75F, 75G, 75I, 75J, 80, 80A.

The Minister for Planning (the Minister) granted approval under Pt 3A of the *Environmental Planning and Assessment Act 1979* (NSW) (the Act) to Moolarben Coal Mines Pty Ltd (Moolarben) to carry out the Moolarben Coal Mine Project (the Project).

The Project comprised the construction and operation of three open cut coal mines and an underground coal mine. The subject land was immediately adjacent to the Ulan Coal Mine owned and operated by Ulan Coal Mines Ltd (Ulan).

The approval was subject to conditions, one of which, Condition 29, dealt with the water supply for the Project. Condition 29 provided:

The proponent must ensure that it has sufficient water for all stages of the project, and if necessary, adjust the scale of mining operations to match its water supply.

Part 3A of the Act provided a separate regime for approval of large scale projects. The power to grant an approval, and to impose conditions on an approval, was contained in s 75J of the Act which relevantly provided:

75J Giving of approval by Minister to carry out project

(1) If:

- (a) the proponent makes an application for the approval of the Minister under this Part to carry out a project, and
- (b) the Director-General has given his or her report on the project to the Minister,

the Minister may approve or disapprove of the carrying out of the project.

(2) The Minister, when deciding whether or not to approve the carrying out of a project, is to consider:

- (a) the Director-General's report on the project and the reports, advice and recommendations (and the statement relating to compliance with environmental assessment requirements) contained in the report, and
- (b) if the proponent is a public authority — any advice provided by the Minister having portfolio responsibility for the proponent, and
- (c) if the Minister has directed an inquiry be held in accordance with section 119 with respect to the project — any findings or recommendations of the Commission of Inquiry.

...

(4) A project may be approved under this Part with such modifications of the project or on such conditions as the Minister may determine.

(5) The conditions of approval for the carrying out of a project may require the proponent to comply with any obligations in a statement of commitments made by the proponent (including by entering into a planning agreement referred to in section 93F).

Held: Lack of certainty and finality and causing a significantly different project

(1) There is no common law principle that an exercise of statutory power must be certain or final in order to be valid.

King Gee Clothing Company Pty Ltd v Commonwealth (1945) 71 CLR 184; *Cann's Pty Ltd v Commonwealth* (1946) 71 CLR 210; *Qiu v Minister for Immigration and Ethnic Affairs* (1994) 55 FCR 439; *Genkem Pty Ltd v Environment Protection Authority* (1994) 35 NSWLR 33; 85 LGERA 197; *Winn v Director-General of National Parks and Wildlife* (2001) 130 LGERA 508, referred to.

(2) A condition will only be invalid, by lacking certainty or finality, if it falls outside the class of conditions which the statute expressly or impliedly permits.

Warehouse Group (Australia) Pty Ltd v Woolworths Ltd (2005) 141 LGERA 376; *Kindimindi Investments Pty Ltd v Lane Cove Council* (2006) 143 LGERA 277; *Hurstville City Council v Renaldo Plus 3 Pty Ltd* [2006] NSWCA 248, referred to.

(3) Condition 29 does not mandate that the proponent produce at the maximum annual level for all stages of the Project.

(4) The power to grant approval on conditions in s 75J of the Act, neither expressly nor impliedly requires, in order for a condition to be valid, that a condition set the parameters for adjustment of a project to achieve an outcome or an objective specified in the conditions.

(5) The power to impose conditions on an approval under Pt 3A of the Act is wide.

(6) The failure of Condition 29 to specify the permissible parameters for adjustment of the scale of mining operations does not cause the Condition to be outside the class of conditions which s 75J of the Act permits.

(7) If Condition 29 could result in the proponent carrying out different mining operations under the Project at a lesser scale, such as by not proceeding with one mine, this could still be said to be a modification of the project. It would therefore be within power.

Transport Action Group Against Motorways Inc v Roads and Traffic Authority (NSW) (1999) 46 NSWLR 598; 104 LGERA 133; *Scott v Wollongong City Council* (1992) 75 LGRA 112, referred to.

Challenge to approval as manifestly unreasonable

(8) The mere existence of uncertainty is not a bar to an administrative decision-maker making a decision to issue an approval for a project. At a basic level, there will always be uncertainty in environmental impact assessment.

(9) By its nature, environmental impact assessment involves a prediction of likely future impacts of a project that have not yet occurred on an environment about which there will invariably be imperfect knowledge.

(10) The precautionary approach of the Minister involved imposing numerous conditions, including requiring monitoring and adaptive management, notably, adjusting the scale of mining operations (and hence the demand for water) to match the available water supply. Such an adaptive management response is a proper approach to deal with uncertainty as to potential impacts.

Telstra Corporation Ltd v Hornsby Shire Council (2006) 67 NSWLR 256; 146 LGERA 10; *Environment Protection Authority v Ballina Shire Council* (2006) 148 LGERA 278, referred to.

(11) It cannot be said that no reasonable person in the position of the Minister could have considered that an appropriate response to the residual uncertainty as to the supply of water for the Project was to approve the Project on conditions requiring monitoring and adaptive management, including adjusting the scale of mining operations (and hence the demand for water) to match the available water supply.

(12) The test for invalidating an exercise of administrative power on the ground of manifest unreasonableness is stringent. The decision of the Minister to approve the Project on conditions, including Condition 29, did not even come close to passing this test.

Obiter The power to impose conditions on an approval under Pt 3A of the Act is not confined in the manner specified for conditions of development consent under Pt 4 of the Act.

Cases Cited

Anderson v Minister for Infrastructure Planning and Natural Resources (2006) 151 LGERA 229.

Belmorgan Property Development Pty Ltd v GPT Re Ltd (2007) 153 LGERA 450.

Cann's Pty Ltd v Commonwealth (1946) 71 CLR 210.

Environment Protection Authority v Ballina Shire Council (2006) 148 LGERA 278.

Genkem Pty Ltd v Environment Protection Authority (1994) 35 NSWLR 33; 85 LGERA 197.

GPT Re Ltd v Wollongong City Council (2006) 151 LGERA 116.

Hurstville City Council v Renaldo Plus 3 Pty Ltd [2006] NSWCA 248.

Kindimindi Investments Pty Ltd v Lane Cove Council (2006) 143 LGERA 277.

King Gee Clothing Company Pty Ltd v Commonwealth (1945) 71 CLR 184.

Mid Western Community Action Group Inc v Mid-Western Regional Council [2007] NSWLEC 411.

Mison v Randwick Municipal Council (1991) 23 NSWLR 734; 73 LGRA 349.

Qiu v Minister for Immigration and Ethnic Affairs (1994) 55 FCR 439.

Scott v Wollongong City Council (1992) 75 LGRA 112.

Telstra Corporation Ltd v Hornsby Shire Council (2006) 67 NSWLR 256; 146 LGERA 10.

Transport Action Group Against Motorways Inc v Roads and Traffic Authority (NSW) (1999) 46 NSWLR 598; 104 LGERA 133.

Warehouse Group (Australia) Pty Ltd v Woolworths Ltd (2005) 141 LGERA 376.

Westfield Management Ltd v Perpetual Trustee Company Ltd [2006] NSWCA 245.

Winn v Director-General of National Parks and Wildlife (2001) 130 LGERA 508.

Application

These proceedings were judicial review proceedings challenging the validity of an approval under Pt 3A of the *Environmental Planning and Assessment Act 1979* (NSW) to the second respondent to carry out the Moolarben Coal Mine Project. The facts of the case are set out in the judgment.

BR McClintock SC and R Beasley, for the applicant.

SJ Gageler SC and SJ Free, for the first respondent.

MJ Leeming SC and SA Duggan and CH Withers, for the second respondent.

Ex tempore

3 June 2008

Preston J.

1 On 6 September 2007, the Minister for Planning granted approval under Part 3A of the *Environmental Planning and Assessment Act 1979* (NSW) to Moolarben Coal Mines Pty Ltd to carry out the Moolarben Coal Mine Project. The Project comprises the construction and operation of three open cut coal mines and an underground coal mine. The land is immediately adjacent to the Ulan Coal Mine owned and operated by Ulan Coal Mines Ltd.

2 The approval was subject to conditions, one of which, Condition 29, dealt with the water supply for the Project. Condition 29 provided:

The proponent must ensure that it has sufficient water for all stages of the project, and if necessary, adjust the scale of mining operations to match its water supply.

3 Ulan has brought judicial review proceedings challenging the validity of the approval on two grounds: first, that Condition 29 lacks certainty and finality and may result in a significantly different project to the one the subject of the

approval and, secondly, the Minister's decision to grant the approval was so devoid of any plausible justification that no reasonable person in the Minister's position would have made it.

The need for water in the mining operations

4 Coal mining, both open cut and underground, creates a demand for water. Once the Project is operating, water is required for washing coal (in the coal handling and preparation plant); dust suppression across the open cut and mine infrastructure areas, such as on stockpile areas, along haul roads and trafficked sections of the mine infrastructure area and to irrigate areas of the site when revegetation and rehabilitation is planned; use in the underground mine area; potable water for administration and bathhouse facilities; and loss by evaporation.

5 The volume of water required has a relationship to production. In one of the water demand assessments accompanying the application for approval, it was estimated that 208 ML of water would typically be required for each million tonnes of Run of Mine (ROM) coal produced. Hence, at peak production of the Project, the water demand was estimated to be 2,500 ML per year.

6 Although production is a key factor, other factors can influence the volume of water required, including the mining methods and atmospheric conditions (in the case of dust suppression) and the extent to which the operator produces ROM or "washed" coal for sale (in the case of coal handling and preparation).

7 To meet the water demand of the Project, water can be obtained from both groundwater and non-groundwater sources. In particular, water can be obtained from:

- (a) surface water runoff from the disturbed mine areas, which would be collected in the mine's dirty water system, and recycling of water from the tailings storage;
- (b) groundwater inflows to the open cut and underground mining operations;
- (c) groundwater extraction from the proposed, production groundwater borefield to be located along the eastern side of the underground coal mine, which will supplement the three existing production bores;
- (d) any other groundwater bores that might be located at other sites where there is an aquifer; and
- (e) water imported from water sources off-site, including the adjoining Ulan and Wilpinjong mines which have surplus water from time to time, but only if agreement can be reached with the operators of those mines.

8 The extent of water supply, therefore, acts as one of the mechanisms (but not the only mechanism) that can regulate the extent and the manner of production. If water supply decreases at any point in time, the demand for water must be decreased to match the available water supply. One mechanism by which this can be done is to reduce production; put simply, less coal, less demand for water.

Consideration of the availability of water for mining operations

9 The issue of the availability of water, and the consequence for the scale of mining operations, were extensively canvassed in the application for approval and in the consideration of that application. This consideration has been an iterative and evolving process.

- 10 On 16 March 2006, pursuant to s 75F of the Act, the Director-General of the Department of Planning issued to Moolarben environmental assessment requirements. The Director-General's requirements required Moolarben to provide an environmental assessment which included "a detailed assessment" of specified "key issues". One of the "key issues" was:

Surface and Groundwater – including detailed modelling of potential surface and groundwater impacts, a site water balance, and a detailed description of any proposed creek diversions. A surface and groundwater contingency strategy must be included as part of the mitigation measures for the project which details the measures proposed to protect environmental flows and the water supply of landowners in the region.

- 11 In September 2006, Moorlarben submitted an Environmental Assessment Report which included detailed consideration of the water management issues arising from the project. The Environmental Assessment Report had 17 appendices. Appendix 5 was a Groundwater Assessment of the Project prepared by Peter Dundon and Associates Pty Ltd dated 8 September 2006. Appendix 6 was a Surface Water Assessment by Patterson Britten & Partners Pty Ltd.

- 12 The Groundwater Assessment, the September 2006 Dundon Report, detailed investigations and modelling of the groundwater resources relating to the Project and made an assessment of the potential impacts of the Project on the groundwater resources. The September 2006 Dundon Report predicted that total inflows of water into the Moolarben Underground 4 mine would be sufficient to meet the Project's water demand in years 2 and 12 to 16 of the Project, but there would be a shortfall in years 1 and 3 to 11 which would need to be met by sourcing water from adjacent mines such as Ulan and Wilpinjong mines, if available, or otherwise by pumping from up to 16 dewatering/water supply bores located along the eastern boundary of the Moolarben Underground 4 Mine (pp 34, 39-41, 42). The Report further stated that if the groundwater inflow rates to Moolarben Underground 4 mine have been significantly over-estimated, and the additional shortfall cannot be provided from the Ulan or Wilpinjong mines, it may be necessary to develop additional water supply pumping bores (that is, additional to the 16 dewatering bores on the eastern side of the underground 4 mine). These could be located at other sites around the perimeter of the Underground 4 mine or in aquifers along Murragamba Valley, down-dip from Moolarben's Open Cuts 1-3 or in the vicinity of an existing bore (p 43).

- 13 The Surface Water Assessment of Patterson Britten described the projected mine water demand and the distribution of this demand. It indicated that 208 ML of water is typically required for each million tonnes of ROM coal and hence, at peak production, the water demand of the Project is estimated to be 2,500 ML/year (p 22). That demand was distributed as follows: coal handling and preparation plant (1,000 ML/year); dust suppression across open cut and mine infrastructure areas (600 ML/year); potable water (Bath-house) (35 ML/year); Use in underground area (425 ML/year); and evaporation (440 ML/year).

- 14 The report discussed the sources of water to meet this demand. It noted that:
The proposed approach to sourcing this water is to make use of all groundwater inflows to the open cut and underground mines. This is to be supplemented by runoff from disturbed or rehabilitated areas of the mine site. Additional water

supply could be obtained from runoff from undisturbed areas that drain through the site. This would be limited to the volume of runoff from 10% of the catchment area in accordance with the harvestable rights criteria and is therefore not considered to be a substantial water source for the mine

(p 22).

15 I note that it is runoff from undisturbed areas, not from disturbed or rehabilitated areas of the mine site, that is said not to be a substantial water source for the mine.

16 On 21 August 2006, pursuant to s 75G of the Act, the Minister directed an Independent Hearing and Assessment Panel (IHAP) to assess particular aspects of the project, including “groundwater impacts”. One member of the IHAP had particular expertise relating to groundwater impacts, namely, Mr Col Mackie.

17 In response to issues raised at the IHAP hearings, Moolarben submitted a preferred project proposal which incorporated changes to the Project. Moolarben provided to the Minister a supplementary groundwater assessment prepared by Peter Dundon and Associates dated 13 December 2006 relating to the preferred project proposal. The December 2006 Dundon Report was based on a modified groundwater model, reflecting changes to the input parameters and modelling approach as well as the variations to the mine plan arising from the preferred proposal. The Report showed that it was likely that water inflows into the Moolarben Underground 4 mine would meet or exceed water demand in years 1, 3, 4 and 13-15, and in the other years, the additional water required would be met from the Moolarben pumping bores (pp 26-27).

18 In February 2007, the IHAP reported to the Minister. The IHAP identified a number of concerns, including in respect of the groundwater modelling procedures (p ii). One of the main groundwater related concerns raised in the course of the IHAP process was said to be “surpluses or deficits in the management of water supply to the proposed operations, resulting in a need to discharge water or source additional water from neighbouring mines or from groundwater resources” (page iv of the IHAP Report). The IHAP acknowledged that a significant effort had been directed towards evaluating groundwater impacts, but nevertheless it continued to have concerns regarding the predicted impacts of mining on regional groundwater systems. One of the reasons for its concern was a lack of confidence in the computer numerical models used to predict impacts. The validity of those predictions depends on how well the models approximate field conditions. The IHAP noted that “field conditions appear to be poorly represented with respect to a number of model design elements” (p iv). The IHAP stated it was “unable to determine with sufficient certainty, the magnitude and extent of impacts likely to prevail upon aquifer systems as a consequence of proposed longwall mining operations at MCMPL [Moolarben]. Consequently, the IHAP has serious reservations concerning the development of an underground mine until such time as impacts are predicted with increased certainty and are found to be acceptable” (pp iv-v and 31-32). This conclusion was based on the uncertainty of the impacts of the underground mine on groundwater, not as to the inflow of groundwater into the underground mine or the volume of water to be extracted from the proposed borefield adjacent to the underground mine.

19 In contrast to the underground mine’s impacts on groundwater, the IHAP was not concerned with the impact of the three open cut mines on groundwater. It considered “the impacts on aquifer systems are likely to be limited in magnitude

and extent” (pp v and 32). The IHAP concluded that it “sees no major impediment to open cut mining” (pp v and 32), providing recommended conditions of approval were imposed. One of the recommended conditions was that “sufficient water supply is available to meet mining demand in the absence of contributions from underground mining operations” (p 32).

20 Following the IHAP Report, Moolarben provided to the Minister a further Supplementary Groundwater Assessment prepared by Peter Dundon and Associates dated 19 April 2007. The April 2007 Dundon Report reported on yet further modelling that had been undertaken and calibrated (the model was referred to as MC 1.6). This calibrated modelling was done to address the IHAP’s concerns. The Report stated that the calibration run on the model MC 1.6 “achieved an acceptable history match with the observed inflows and drawdown impacts at Ulan to the 2005-6” (p 21). However, there were still some discrepancies that were noted, including that Ulan mine inflow at 1987 was predicted by the model to be about 2 ML/d, compared with a reported actual inflow rate of 3 ML/d, and Ulan mine inflow at 2006 was predicted by the model to be about 12 ML/d, compared with reported actual inflow of about 9 ML/d (p 21).

21 The April 2007 Dundon Report concluded that inflows from the open cuts and the underground mine would exceed water demand in Years 1 and 13 to 15 of the Project. In all other years, the inflow rates will be less than water demands and some pumping will be required from the bores if an alternative water source from either the Ulan or Wilpinjong mines, is not available (pp 26, 38 of the April 2007 Dundon Report).

22 On 4 July 2007, Peter Dundon and Associates forwarded to the Department of Planning a letter setting out the results of additional groundwater modelling carried out following a meeting with Mr Col Mackie. The July 2007 Dundon Report reported on yet further groundwater modelling (the model was referred to as MC 1.9). This model adopted lower permeability rates for certain strata so as to better calibrate the model with the actual inflow rates of the Ulan mine. However, it was not possible to also achieve acceptable calibration with drawdown impacts of the Ulan mine. The predicted drawdowns were substantially greater than the observed drawdowns (p 5). To achieve satisfactory drawdown calibration would have required the adoption of both permeability and recharge in one of the strata (the Triassic) to levels beyond what Dundon considered credible (p 5). The Report concluded that the model that best matched the available monitoring data and field testing results was the MC 1.6 model which was the basis of the April 2007 Dundon Report (p 6). Nevertheless, the July 2007 Dundon Report presented the results of the run of model MC 1.9. This revealed that there would be a deficit in years 6-12 (that is, water demand exceeded water inflow into the open cuts and underground mine and water from the wells).

23 In August 2007, Mr Col Mackie, the member of the IHAP who had expertise relating to groundwater impacts, provided a report to the Department of Planning which reviewed the additional material provided by Moolarben relating to groundwater issues, being the April 2007 and July 2007 Dundon Reports.

24 The Mackie Report reviewed both of the models and the results of the runs of models MC 1.6 and MC 1.9. The Mackie Report stated in the section “Overview of likely impacts”:

The revised models MC1.6 and MC1.9 are considered to be more representative of the longwall mining process than earlier models presented to the IHAP. Based on the information provided in PDA 2007a [the April 2007 Dundon Report] and 2007b [the July 2007 Dundon Report] reports the predicted groundwater related impacts are considered plausible

(p 4).

25 The Mackie Report then considered four types of impacts on groundwater, the third of which was on “mine water supply”. It stated:

Water supply for the open cut and underground operations is reliant upon the installation of a substantial borefield situated on the eastern boundary of the UG4 longwall panel footprint. Simulation of the borefield in model MC1.6 indicates mine water demand could be met from the borefield with a surplus in supply during years 1 to 16 (large surpluses in years 1 and 13 to 15). In contrast, model MC1.9 predicts variable surpluses in years 1 to 4, large deficits in years 5 to 12 and large surpluses in years 13 to 16.

The marked reduction in surplus years (and increase in deficit years) indicated by Model MC1.9 is attributed to be a reduction in the permeability of certain strata in that model. While PDA favours Model MC1.6 outcomes, it is quite possible that strata permeabilities are indeed lower than predicted and as a result, there may be insufficient water available from the borefield over the planned mine life. Under these circumstances it is understood that MCP [Moolarben] may seek to import mine water from UCML [Ulan] operations where a surplus apparently prevails

(p 5).

26 The Mackie Report expressed a number of conclusions, one of which was that:

- mine water supply from the borefield and from seepage to underground operations should be sufficient to meet mine water demand if strata hydraulic properties at a regional scale are consistent with expectation (Model MC1.6). Continuous and accurate monitoring of all aspects of water management would need to be documented in a site water management plan

(p 6).

27 The Mackie Report continued:

Based on recent modelling (model MC1.6) and information supplied by PDA we see no outstanding groundwater related issues that might impede development of underground mining. However, we do recommend a precautionary approach to development that encompasses rigorous monitoring of the groundwater regime.

Consent conditions in relation to groundwater, would need to include recommendations made by the IHAP in respect of subsidence and open cut mining, extended to include underground mining operations and formalised within a groundwater monitoring plan

(p 6).

28 One of the recommendations the IHAP had made, as noted earlier, was that sufficient water supply be available to meet mining demand. The Mackie Report suggested that conditions of approval include:

- a comprehensive and accurate accounting of all water inflows to, and waters pumped from underground operations, and from the adjacent borefield in order to quantify groundwater seepage

(p 6).

29 In September 2007, pursuant to s 75I of the Act, the Director-General provided an Environmental Assessment Report on the Project to the Minister for his consideration of whether or not to grant approval to the Project.

30 In Table 1 of the Report, considering the major components of the Project, the Director-General stated in relation to “Water Demand and Supply” that:

Water demand would vary, however peak demand is predicted to be approximately 6.9 megalitres (ML) a day (2500 ML a year), mainly for coal processing and dust suppression.

This water would be sourced primarily from surface run-off within disturbed areas, groundwater inflows into the open cut and underground operations, and a borefield of up to 20 bores

(p 3).

31 In the section dealing with water resources, the Director-General deals specifically with the issue of water balancing – balancing the water demand and the water supply for the Project (pp 18-21). The Director-General set out the water demands of the Project and the potential water supply sources (p 19). The Director-General noted:

While Moolarben anticipates that it will have more than enough water available on site to cater for its predicted water demand, and is therefore unlikely to be required to import water from off-site, the groundwater modelling carried out after the public hearings (see *Appendix E*) casts some doubt on these claims.

Simulation of the borefield in Model MC 1.6, for instance, indicates that mine water demand could be met from the groundwater borefield with a surplus in years 1 to 16 (with large surpluses in years 1 and 13 to 15). However, Model MC 1.9 predicts variable surpluses in years 1 to 4, large deficits in years 5 to 12, and large surpluses in years 13 to 16.

According to the Panel, the marked reduction in surplus years (and increase in deficit years) indicated by Model MC 1.9 is attributable to the reduction in the permeability of certain strata in that model.

While the Panel notes that Moolarben favours the predictions from Model MC 1.6, it acknowledges that “it is quite possible that strata permeabilities are indeed lower than predicted, and as a result there may be insufficient available from the borefield over the planned mine life.” However, this is a matter that cannot be settled now, and is only likely to become clearer once better, and more site-specific, groundwater data becomes available.

Nevertheless, the potential deficit poses significant commercial risks for Moolarben, which would need to secure additional water supply from other sources in the region or curtail its mining operations to match its available water supply, should the deficits eventuate

(pp 19-20).

32 The Director-General made certain recommendations concerning the desirability of water sharing with other mines in the area, including the Ulan coal mine. The Director-General then stated:

Finally, the Department believes that Moolarben should also be required to keep an accurate water balance for the project, review this water balance regularly, and continually investigate ways to minimise water use on site

(p 20).

33 In relation to groundwater impacts, the Director-General agreed with Mr Mackie’s conclusions and recommended conditions of consent which would require Moolarben to:

- prepare a detailed water management plan for the project that includes a comprehensive groundwater monitoring plan and groundwater response plan;
- use the monitoring data to calibrate and validate the groundwater model to site specific conditions;
- commission a suitably qualified and independent expert whose appointment has been approved by the Director-General to review the groundwater monitoring data at the end of each longwall panel, and comprehensively audit the groundwater impact of the project at the end of longwall panels 4 and 8

(p 21).

34 The Director-General concluded in relation to the water issues:

After considering the Panel's advice, and assessing the EA and Moolarben's various responses to the issues raised in submissions, the Department is satisfied that the potential surface and ground water impacts of the project can be suitably managed to ensure an appropriate level of environmental performance.

However, given the uncertainty associated with some of the predictions, the paucity of site-specific data on certain matters, and the shortcomings in some of the assessment, the Department agrees with the Panel's recommendation that a precautionary approach be adopted to any development on site.

Consequently, the Department believes that Moolarben should be required to:

- ensure that there is sufficient water available on site during all stages of the project, and if necessary, adjust the scale of mining operations on site to match the available water supply;
- ensure that any surface water discharges comply with the relevant ANZECC criteria for the protection of aquatic ecosystems;
- provide suitable compensation or compensatory measures to the owners of privately owned land whose water supply has been adversely affected by the project;
- offset the loss of any base flow to the Goulburn River and associated tributaries caused by the project;
- ensure that all storages on site are suitably lined to comply with a permeability standard of $< 1 \times 10^{-9}$ m/s;
- commission an independent expert to carry out a regional water supply/monitoring program investigation in consultation with DWE, DECC, DPA and the owners of the Ulan and Wilpinjong coal mines to examine the feasibility and potential environmental benefits of increased water sharing between the three mining companies in the region;
- prepare and implement a detailed Water Management Plan for the project, which includes an erosion and sediment control plan, surface and ground water monitoring programs, and a surface and ground water response plan;
- commission independent experts to review the surface and ground water monitoring data at the end of each longwall panel, and carry out a comprehensive audit of the subsidence, and surface and ground water impacts of the project at the end of longwall panels 4 & 8; and
- review and update the various management plans and monitoring plans after each independent audit

(p 24).

35 It will be seen that the first dot point corresponds with the challenged Condition 29 of the approval. The other dot points also correspond to conditions of the approval that was granted by the Minister.

36 The Minister was provided with the Director-General's Environmental Assessment Report and a briefing note relating to the project. The briefing note included a summary of water management issues.

The Minister grants approval for the Project

37 On 6 September 2007, the Minister signed the briefing note and approved the Project, subject to conditions. The conditions were included in a series of schedules. Schedule 2 contained the "administrative conditions" including:

Terms of approval

2. The Proponent shall carry out the project generally in accordance with the:
 - (a) EA [defined to be Moolarben's Environmental Assessment of September 2006 as modified by the Preferred Project Report submitted in December 2006 and the response to submissions];
 - (b) statement of commitments [in Appendix 3 of the approval]; and
 - (c) conditions of this approval.

Notes:

- *The general layout of the project is shown in Appendix 2.*
- *The statement of commitments is reproduced in Appendix 3 (excluding the commitments which are directly reflected in, or consistent with, the conditions of this approval).*

Limits on Approval

5. Mining operations may take place for 21 years from the grant of the mining lease for the project.[Note: omitted]
6. The Proponent shall not:
 - (a) produce more than 10 million tonnes of coal a year; or
 - (b) extract more than 8 million tonne of ROM coal a year from the open-cut mining operations, and 4 million tonnes of ROM coal a year from the underground mining operations.

38 Schedule 3 contained "specific environmental conditions". These specific environmental conditions set parameters limiting the manner in which the Project may be carried out so as to achieve desired environmental outcomes. There were conditions dealing with noise, from various sources (conditions 2-10), blasting and vibration (conditions 11-20), air quality (conditions 21-24) and, of relevance to this case, water (conditions 29-39). In each case, the constraints imposed by the specific environmental conditions impacted on mining operations.

39 The conditions dealing with water reflected the recommendations in the Director-General's Environmental Assessment Report. Condition 29 dealt specifically with "water supply". It provided:

The Proponent must ensure that it has sufficient water for all stages of the project, and if necessary, adjust the scale of mining operations to match its water supply.

40 However, other conditions also related to the issue of water supply for the Project, including Condition 34 requiring preparation and implementation of a water management plan, including a site water balance, a groundwater monitoring plan and a surface and groundwater response plan; condition 35 dealing with the Site Water Balance; condition 38 dealing with the Groundwater Monitoring Plan; and condition 39 dealing with the Surface and Ground Water Response Plan. These conditions would also require the proponent to have a balancing or matching of water supply and demand.

41 The approval defines various words used in the approval. Of importance to the construction of Condition 29 the terms “project” and “mining operations” are defined. “Project” is defined to be “the development as described in the EA”. The “EA” is defined to be “The report titled *Moolarben Coal Project Environmental Assessment, Volumes 1-5*, dated September 2006, as modified by the Preferred Project Report submitted to the Department in December 2006, and the response to submissions”. “Mining operations” are defined to include “all coal extraction, processing, and transportation activities carried out on site”.

The statutory framework for granting approval

42 The approval was granted under Part 3A of the Act. Part 3A provides a separate regime for approval of large scale projects, distinct from the regimes under Part 4 of the Act for the grant of development consent and Part 5 dealing with approvals for activities. The power to grant an approval, and to impose conditions on an approval, is contained in s 75J of the Act. That section provides, so far as is relevant:

75J Giving of approval by Minister to carry out project

(1) If:

- (a) the proponent makes an application for the approval of the Minister under this Part to carry out a project, and
- (b) the Director-General has given his or her report on the project to the Minister,

the Minister may approve or disapprove of the carrying out of the project.

(2) The Minister, when deciding whether or not to approve the carrying out of a project, is to consider:

- (a) the Director-General’s report on the project and the reports, advice and recommendations (and the statement relating to compliance with environmental assessment requirements) contained in the report, and
- (b) if the proponent is a public authority—any advice provided by the Minister having portfolio responsibility for the proponent, and
- (c) if the Minister has directed an inquiry be held in accordance with section 119 with respect to the project—any findings or recommendations of the Commission of Inquiry.

...

(4) A project may be approved under this Part with such modifications of the project or on such conditions as the Minister may determine.

(5) The conditions of approval for the carrying out of a project may require the proponent to comply with any obligations in a statement of commitments made by the proponent (including by entering into a planning agreement referred to in section 93F).

Ulan’s challenge to Condition 29 on grounds of lack of certainty and finality and causing a significantly different project

43 Ulan submits that Condition 29 lacks certainty and finality and may result in a significantly different project to the one that is the subject of the application and the Environmental Assessment accompanying the application.

44 Ulan provides three reasons:

- (a) *Internal illogicality*: Ulan submits that the two limbs of Condition 29 do not make logical sense. If Moolarben has to ensure that it has sufficient water for all stages of the Project, then there will not be any need to adjust the scale of the mining operations of the Project as

approved. If, however, there is a need to adjust those mining operations because of insufficient water supply, then Moorlarben will not be in a position to “ensure that it has sufficient water for all stages of the Project” (paragraph 29 of Ulan’s pre-hearing written submissions).

- (b) *Lack of certainty as to adjustment permitted*: Ulan submits that if, as is likely or at the very least possible, Moorlarben does have to adjust the scale of its mining operations because of inadequate water supply, to what extent will Moorlarben adjust those operations? No guidance is given, and no parameters are set, by the terms of Condition 29 (paragraph 30 of Ulan’s pre-hearing written submissions).
- (c) *Potential for significantly different project as a result of adjustment*: Ulan submits that by Condition 29 requiring that the size and scope of the mine be limited by reference to such water as may be available, the approval is of a potentially different mine to that described in the Environmental Assessment accompanying the application and Condition 6 of the approval. A lack of water may result in the proponent not carrying out key components of the Project such as one or more of the three open cut mines or the underground mine. A project with some of the mines is a significantly different development to a project with all four mines. A mine which does not extract up to the maximum tonnage of coal from the four mines fixed by condition 6, and hence, not employ the expected number of people or produce the expected revenue for the State based on the above, is also a significantly different development (paragraphs 32 and 33 of Ulan’s written pre-hearing submissions and paragraphs 15-19 of Ulan Supplementary Written Submissions on significantly different development).

45 Ulan developed its arguments in both written submissions (pre-hearing and supplementary at the hearing) and oral submissions.

46 Ulan relies on the principles expounded in *Mison v Randwick Municipal Council* (1991) 23 NSWLR 734; 73 LGRA 349 and subsequent consideration of these principles in *Winn v Director-General of National Parks and Wildlife* (2001) 130 LGERA 508, *Kindimindi Investments Pty Ltd v Lane Cove Council* (2006) 143 LGERA 277 and *Mid Western Community Action Group Inc v Mid-Western Regional Council* [2007] NSWLEC 411 (18 July 2007).

47 The Minister and Moorlarben contest: Ulan’s construction of Condition 29; that Condition 29 is uncertain, or lacking finality, or might result in a significantly different project to that for which approval was sought; and that the Condition 29 is outside the power under s 75J of the Act. They have provided written submissions (pre-hearing and at the hearing) and oral submissions.

48 I consider Ulan has not established that Condition 29 is outside power, and hence invalid, on the grounds of lack of certainty or finality or may result in a significantly different development to that for which approval was sought.

49 At the outset, it should be noted that there is no common law principle that an exercise of statutory power must be certain or final in order to be valid: see *King Gee Clothing Company Pty Ltd v Commonwealth* (1945) 71 CLR 184 at 194-195; *Cann’s Pty Ltd v Commonwealth* (1946) 71 CLR 210 at 227-228; *Qiu v Minister for Immigration and Ethnic Affairs* (1994) 55 FCR 439 at 447; *Genkem Pty Ltd v Environment Protection Authority* (1994) 35 NSWLR 33 at 42; 85 LGERA 197 at 205 and *Winn v Director-General of National Parks and Wildlife* (2001) 130 LGERA 508 at [12].

- 50 Rather, a condition will only be invalid, by lacking certainty or finality, if it falls outside the class of conditions which the statute expressly or impliedly permits: *Winn v Director-General of National Parks and Wildlife* at [12]-[15], [34]-[36]; *Warehouse Group (Australia) Pty Ltd v Woolworths Ltd* (2005) 141 LGERA 376 at [89]; *Kindimindi Investments Pty Ltd v Lane Cove Council* at [55], [57]; *GPT Re Ltd v Wollongong City Council* (2006) 151 LGERA 116 at [90] (appeal dismissed sub nom *Belmorgan Property Development Pty Ltd v GPT Re Ltd* (2007) 153 LGERA 450) and *Hurstville City Council v Renaldo Plus 3 Pty Ltd* [2006] NSWCA 248 at [89]-[90] (8 September 2006). Where a condition does fall outside what the statute permits, the purported approval is not an approval under the statute at all (assuming the condition is not severable).
- 51 The relevant question in this case, therefore, is whether Condition 29 falls outside the power to impose conditions that s 75J of the Act expressly or impliedly permits. This involves construction of the section and its application to the circumstances of this particular Project: see *Winn v Director-General of National Parks and Wildlife* at [12], [34]-[36].
- 52 In this case, Ulan submits that the condition does fall outside the power to impose conditions for the three reasons I have set out earlier, namely internal illogicality, lack of certainty as to the extent of adjustment of mining operations permitted, and the potentiality for the project to be significantly different from that for which approval was sought and granted.
- 53 As to the first reason, internal illogicality, Ulan's challenge that Condition 29 is illogical in its terms is not made out on a proper construction of Condition 29. Ulan's argument of illogicality depends on, first, the first phrase in Condition 29 ("the proponent must ensure that it has sufficient water for all stages of the project") mandating that the proponent operate at the maximum levels of production permitted by Condition 6 of the approval for all stages of the Project with the concomitant scale of mining operations that production at these levels entails, and, secondly, that the second phrase of Condition 29 ("and if necessary adjust the scale of mining operations to match its water supply") mandating that the proponent adopt this means of ensuring it has sufficient water for the Project. Only then could the condition require both production at maximum scale and also adjustment to a lesser scale, which is said by Ulan to be the illogicality. Neither construction is sustainable.
- 54 The first phrase of Condition 29 does not mandate that the proponent carry out the Project at any particular scale of mining operations. Condition 6 does fix maximum annual levels of production for the four mines and production at these levels would necessarily involve particular scales of mining operations, but there is no requirement that the proponent produce at those maximum levels and nothing less; that is to say, Condition 6 sets, for each year, ceilings, but not floors, for production and, hence, scale of mining operations. Furthermore, other aspects of the approval establish that no minimum level of production is required. At the maximum rates permitted by Condition 6, Moolarben would have to extract $8 \times 21 = 168$ Mt from the open-cut mines, plus $4 \times 21 = 84$ Mt from the underground mine, making 252 Mt. The total resource is only 125 Mt. Therefore, Moolarben could not extract at the maximum annual levels permitted for the life of the project. This is shown in the Director-General's report where he summarised the sequence of open-cut mines completing in year 12 and the underground mine completing in year 16 (p 3).

55 Further, there has been a deliberate decision by Moolarben not to mine Open Cut 1 at its maximum rate so that noise and air quality constraints are met. This is set out in the Environment Assessment accompanying the application:

Open Cut 1 has been restricted in operations to 7 Mtpa for the first three years of mining to ensure noise and air quality criteria for the village of Ulan are not breached:

(p S4-28).

56 Condition 29 also does not mandate that the proponent produce at the maximum annual level for all stages of the Project. The proponent is at liberty to carry out mining operations at a scale that results in production at lesser levels than the annual maximum levels fixed by Condition 6 if it so chooses.

57 The first phrase in Condition 29 is, in fact, an outcome or objective that the Project must achieve. The Condition does not specify all of the various means by which the proponent might achieve this outcome. That is left to the proponent to determine.

58 The most commercially attractive means for Moolarben is to secure a water supply adequate to meet production. If the inflows and bore water flows are as predicted by the model MC 1.6, there will be adequate water supplies even at peak production. If there is not – and the monitoring required by conditions of approval may give advance notice of this – Moolarben must secure water from other sources. The September 2006 Dundon Report contemplated that one other source of water could be other water supply pumping bores that could be located at other sites around the perimeter of the underground mine or in aquifers along Murragamba Valley, down-dip from Moolarben’s three open cut mines. Alternatively, Moolarben could endeavour to reach agreement with the Ulan or Wilpinjong mines to obtain water. The fact that Ulan currently has expressed opposition to supplying water to Moolarben does not foreclose the option in the future, perhaps many years later. Further, there is still the Wilpinjong mine as a possible source of water.

59 If, however, additional water supplies cannot be obtained to match the water demand at any particular level of production and scale of mining operations, it would be necessary for Moolarben to reduce the demand for water by a sufficient amount to match the available water supply.

60 The distribution of water demand shows that the two greatest causes of demand are coal handling and preparation (1,000 ML/year) and dust suppression across the open cut and mine infrastructure areas (600 ML/year). A reduction in production by scaling down open cut production, and hence the volume of coal needing to be handled and prepared, can reduce the water demand. Similarly, reducing production in the underground mine (which uses 425 ML/year) will also reduce the volume of coal needing to be handled and prepared.

61 A reduction in production in the open cut mines, and in the underground mine, and a consequential reduction in the volume of coal handled and prepared, is sensibly described as an adjustment in the scale of mining operations.

62 The second phrase of Condition 29, therefore, is merely a specification of one of the means of achieving the outcome or objective specified in the first phrase of Condition 29. That means would only be necessary if other means, notably securing additional water supplies, are not able to be achieved – a fact recognised by the prefatory words in the second phrase “if necessary”.

63 Once it is recognised that condition 29 (and indeed no other condition of the approval) requires Moolarben to operate at the maximum scale permitted and that Condition 29 does not mandate that the only means by which Moolarben can balance water supply and demand is to adjust the scale of operations, no illogicality arises.

64 Properly construed, Condition 29 is both logical and responsive to the issue of water supply availability.

65 As to the second reason Ulan advances, namely the lack of certainty as to what might be required to adjust the scale of mining operations to match its water supply, Ulan submits that the words “scale of mining operations” are ambiguous and uncertain.

66 Mere ambiguity or uncertainty of the meaning of words does not necessarily lead to invalidity. Courts try to avoid uncertainty by adopting a construction which gives statutory instruments and decisions practical effect: see, for example, *Westfield Management Ltd v Perpetual Trustee Company Ltd* [2006] NSWCA 245 at [36]-[40] (8 September 2006) (special leave to appeal was refused but with a qualification on proper approach to construction of conditions: *Westfield Management Ltd v Perpetual Trustee Company Ltd* [2007] HCA Trans 367 (1 August 2007), at 23), *Anderson v Minister for Infrastructure Planning and Natural Resources* (2006) 151 LGERA 229 at [82] and *MidWestern Community Action Group Inc v Mid-Western Regional Council and Stockland Development Pty Ltd* at [23].

67 In this case, construction of condition 29 is assisted by the definitions in the approval. The first phrase in condition 29 refers to “the project”. That term is defined to be the development described in the Environmental Assessment. It includes the three open cut mines and the underground mine and the associated mine infrastructure. The second phrase in condition 29 refers to “mining operations”. That term is defined to include “all coal extraction, processing, and transportation activities carried out on site”.

68 The structure of the condition is that the first phrase fixes the principal obligation, while the second phrase fixes a subordinate obligation. Hence, the reference in the second phrase to mining operations must be seen to be those involved in carrying out the project referred to in the first phrase.

69 Hence, an adjustment of the scale of mining operations cannot cause an adjustment of the Project as defined.

70 In the context of the water supply issue, an adjustment of the scale of mining operations refers to those adjustments to aspects of mining operations which create demand for water, such as the production of coal from the open cut mines and underground mine and the handling and preparation of coal so produced. A reduction in production and in the volume of coal handled and prepared involves an adjustment of the scale of mining operations.

71 The words “adjust the scale of mining operations” do not permit the carrying out of mining operations exceeding or otherwise in breach of the permissible outer parameters of what is the project, as defined by the approval and set by the conditions, particularly Conditions 2, 5 and 6 of Schedule 2. They simply allow the carrying out of mining operations within, but not exceeding, those parameters.

72 This construction of Condition 29 is consistent with the admonition that courts should adopt a construction which gives statutory instruments and decisions practical effect by avoiding uncertainty.

- 73 Ulan also argues that Condition 29 is uncertain because it does not specify the precise way in which Moolarben must adjust its mining operations, that is to say, specify the parameters governing any adjustment.
- 74 However, the power to grant approval on conditions in s 75J of the Act, neither expressly nor impliedly requires, in order for a condition to be valid, that a condition set the parameters for adjustment of a project to achieve an outcome or an objective specified in the conditions. The power to impose conditions on an approval under Part 3A of the Act is not confined in the manner specified for conditions of development consent under Part 4 of the Act (see ss 80 and 80A of the Act). The power to grant approval under s 75J is expressly stated to be able to be exercised, first, “with such modifications of the project” and, secondly, “on such conditions”, as the Minister may determine in both cases.
- 75 Clearly, the power to impose conditions on an approval under Part 3A is wide. There is no warrant to read that power down by imposing the limitation argued by Ulan that parameters of any adjustment to the Project to meet any outcome or objective specified, must also be specified.
- 76 In these circumstances, the failure of Condition 29 to specify the permissible parameters for adjustment of the scale of mining operations does not cause the Condition to be outside the class of conditions which s 75J permits.
- 77 Moreover, Ulan’s argument that without such specification of parameters, there is legally unacceptable uncertainty, is not established. Questions of degree are always involved in determining whether a condition is sufficiently uncertain so as to be outside power: *Transport Action Group Against Motorways Inc v Roads and Traffic Authority (NSW)* (1999) 46 NSWLR 598; 104 LGERA 133 at [117].
- 78 Retention of practical flexibility, leaving matters of detail for later determination, and delegation of supervision of some stage or aspect of the development, may all be desirable and be in accordance with the statutory scheme: see *Scott v Wollongong City Council* (1992) 75 LGRA 112 at 118; *Transport Action Group Against Motorways v Roads and Traffic Authority* at [117]-[122]; *Kindimindi Investments Pty Ltd v Lane Cove Council* at [55] and *Hurstville City Council v Renaldo Plus 3 Pty Ltd* at [89].
- 79 In this case, leaving a choice of the means by which the outcome or objective of ensuring sufficient water for all stages of the project is to be met, to the proponent, including the nature and extent of adjustments that should be made, cannot be said to be outside the statutory scheme of Part 3A of the Act and in particular the power under s 75J to grant approval subject to conditions.
- 80 The scale of the projects subject to approval under Part 3A, which are often complex, extensive and multi-stage projects, make the retention of such flexibility appropriate and inevitable, a point also made in relation to other large scale projects under Part 5 of the Act (see *Transport Action Group Against Motorways v Roads and Traffic Authority* at [124]-[125]) and under Part 4 (see *Kindimindi Investments Pty Ltd v Lane Cove Council* at [54]).
- 81 It must also be remembered that any adjustments to mining operations that might be made pursuant to Condition 29 cannot cause the project to depart from the essential outer parameters set by the definition of the project and the other conditions of the approval, notably Conditions 2, 5 and 6 in Schedule 2 of the approval.

82 As to the third reason Ulan advances, namely that the project might be significantly different to that for which approval was sought, there are two responses, one factual and the other legal.

83 The factual response is that adjustment of the scale of mining operations, so as to operate at less than the maximum production permitted by Conditions 2 and 6, does not effect a significantly different development to that for which approval was sought.

84 Ulan's argument again depends on an assumption that the project for which approval was sought was one that mandated production at the maximum annual levels prescribed, with the concomitant scale of mining operations that production at the maximum annual levels would involve. Only if this assumption is made can Ulan sustain its argument that production at lower annual levels, with a concomitant reduction in the scale of mining operations, involves a different project – the applied for project with maximum prescribed production and concomitant scale of mining operations and the different, adjusted project with lower production and concomitant reduced scale of mining operations.

85 However, Ulan's assumption is factually incorrect. Nowhere in the application or accompanying documents, including the project description, is there an articulation that the project will only ever operate at the maximum levels of production, with the concomitant scale of mining operations and never at any lesser levels or scale. A degree of flexibility was inherent in the description of the proposal and its staging.

86 Hence, the possibility that, if available water supply at any stage of the Project is less than the water demand of the Project at that stage, it might be necessary to adjust the scale of mining operations to reduce the water demand to match the available water supply, does not result in a different project, let alone a significantly different project, to that for which approval was sought.

87 This factual response to Ulan's argument is encapsulated in the following extract in the written submissions of the Minister:

The Water Supply Condition does not have the effect of deferring or delegating the approval of any aspect of the Project. Nor does the Water Supply Condition have the effect of significantly altering the development for which approval was sought. As noted above, the condition does no more than reflect the commercial and practical reality which was inherent in the Project from the time of the application – that Moolarben would need to obtain sufficient water for its proposed mining operations and, if necessary, would have to adjust the scale of its mining operations to reflect the available water at any given time. This contingency was implicitly acknowledged by Moolarben in its preliminary assessment which accompanied the Pt 3A application and which described Moolarben's strategy for managing groundwater and surface water issues relating to the Project. The application was not for a fixed, precise program of operations and no such application could plausibly be made in respect of a 21-year mining project involving 4 mines. Variation in the scale of operations from time to time, whether because of water supply or any of the other variables affecting mining operations, was always a feature of the application for approval. To the extent that the Water Supply Condition contemplated adjustments to the scale of the mining operations arising because of issues with water supply, this was entirely in keeping with the development as described in the Project. The Water Supply Condition does nothing to alter the character of the development for which approval was sought. Adjustments in the scale of mining operations from time to time will be a matter of degree only. Moreover, given the cap on annual extractions, any adjustment will

reduce the environmental impact of the mine. Such adjustments cannot be said to produce a project which “might bear no sensible comparison to” the project described in the application, as Ulan submits (at paragraph 43). Ulan’s suggestion that the condition prescribed a significantly altered development is unsustainable:

(para 24 of the Minister’s submissions).

88 The legal response to Ulan’s argument that Condition 29 may result in a significantly different project is that this will only be legally relevant if to do so would take Condition 29 outside power. As noted above, s 75J(4) of the Act expressly empowers the Minister to approve a project “with such modifications of the project ... as the Minister may determine”.

89 The Minister had power to approve Moorlarben’s project with such modifications as the Minister might determine. The project approved by the Minister is not only that specified in Condition 2 and 6, but also the other conditions of approval which might modify the project, including Condition 29.

90 Hence, if Condition 29 could result in the proponent carrying out different mining operations under the Project at a lesser scale, such as by not proceeding with one mine (a construction I have rejected), this could still be said to be a modification of the project. It would therefore be within power.

91 Accordingly, Ulan has not made out its challenge to the validity of Condition 29 on the grounds that the Condition lacks certainty and finality and would result in a significantly different development to that for which approval was sought.

Ulan’s challenge to approval as manifestly unreasonable

92 Ulan contends that “the combination of the uncertainty of the water supply for [the Project], leading to and coupled with the acknowledgment that a condition as imprecise and uncertain as Condition 29 was needed to prop up the Part 3A Approval, more than adequately demonstrates that the decision to grant the Part 3A Approval here was a decision that falls within all recognised formula for Wednesbury unreasonableness”: para 47 of Ulan’s written pre-hearing submissions.

93 I have held that Condition 29 is not so imprecise or uncertain as to be outside power. This removes the second limb of Ulan’s argument that the exercise of power to grant approval was manifestly unreasonable.

94 As to the first limb, namely the uncertainty of the water supply, it cannot be said that no reasonable person in the position of the Minister could have granted an approval for the Project having regard to the uncertainty of the water supply.

95 First, the mere existence of uncertainty is not a bar to an administrative decision-maker making a decision to issue an approval for a project. At a basic level, there will always be uncertainty in environmental impact assessment. By its nature, environmental impact assessment involves a prediction of likely future impacts of a project that has not yet occurred on an environment about which there will invariably be imperfect knowledge. Where the environment is to a large extent hidden, such as underground strata and aquifers, the uncertainty is necessarily heightened. Nevertheless, decisions need to be made. The question is whether there is sufficient, credible information upon which to assess the impacts of a project and make a decision. That is a factual question for the decision-maker to answer.

96 Secondly, the degree of uncertainty about water supply was, in the end, not as extreme as Ulan suggests. Through the process of the Director-General’s

environmental assessment requirements, the IHAP hearing and report, the Mackie Report, and Moolarben's detailed responses thereto, and the Director-General's Environmental Assessment Report, the issue of the availability of water supply to match water demands for the Project was thoroughly canvassed.

97 Uncertainty as to the issue was reduced through this process. The IHAP, represented by Mr Mackie on the groundwater impacts, concluded that "the uncertainty relating to groundwater model predictions" had been reduced, that the revised models were more representative of the underground mining process, that the "predicted groundwater related impacts are considered plausible", and that there were "no outstanding groundwater related issues that might impede development of underground mining". The Director-General in the Environmental Assessment Report to the Minister agreed with the IHAP's conclusions.

98 Thirdly, the Minister's decision responded to the residual uncertainty (the uncertainty as to the water supply may have been reduced but it had not been eliminated). Although the preferred model MC 1.6 predicted that the water supply from inflows to the open cut and underground mines together with pumping from the proposed borefield would provide sufficient water supply for all stages of the Project, there was still a possibility that if the permeabilities were lower, as predicted by model MC 1.9, insufficient water would be able to be obtained from the borefield over the planned mine life. A precautionary approach to this possibility (and the residual uncertainty) was recommended to the Minister by the IHAP and the Director-General.

99 This precautionary approach involved imposing numerous conditions, including requiring monitoring and adaptive management, notably, adjusting the scale of mining operations (and hence the demand for water) to match the available water supply. Such an adaptive management response is a proper approach to deal with uncertainty as to potential impacts: see *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256; 146 LGERA 10 at [162]-[165] and *Environment Protection Authority v Ballina Shire Council* (2006) 148 LGERA 278 at [74]-[75]. Certainly, put in the language of judicial review, it cannot be said that no reasonable person in the position of the Minister could have considered that an appropriate response to the residual uncertainty as to the supply of water for the Project was to approve the Project on conditions requiring monitoring and adaptive management, including adjusting the scale of mining operations (and hence the demand for water) to match the available water supply.

100 The test for invalidating an exercise of administrative power on the ground of manifest unreasonableness is stringent. The decision of the Minister to approve the Project on conditions, including Condition 29, does not even come close to passing this test.

Conclusion and orders

101 Ulan has failed to establish either of the two grounds on which it had challenged the validity of the Minister's approval of the Moolarben Coal Mine Project. Accordingly, Ulan's application should be dismissed.

102 There is no reason in the circumstances of this case that would justify a departure from the usual order as to costs, namely, that costs follow the event.

103 Accordingly, the Court orders:

1. The application is dismissed.
2. The applicant is to pay the costs of the respondents.
3. The exhibits may be returned.

Application dismissed

Solicitors for the applicant: *Minter Ellison*.

Solicitor for the first respondent: Department of Planning.

Solicitors for the second respondent: *Sparke Helmore*.

J VENEZIANO