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Cumulative Environmental Impacts

Environmental impacts from development may be considered relatively insignificant when assessed in isolation, however they may potentially become very significant when assessed in the context of the impacts of other developments nearby or in the general locality. Given the heightened awareness of the potential consequences of adverse environmental impacts and the desirability for sustainable development, it can be expected that consent authorities (including the Land and Environment Court) will give increasing attention and weight to cumulative environmental impacts.

This article sets out the relevant provisions in the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) dealing with cumulative environmental impacts and some caselaw. To further illustrate the approach taken by the Land and Environment Court in relation to cumulative environmental impacts, a case dealing with the *National Parks and Wildlife Act 1974* (**NPW Act**) is also discussed.

Under Part 5 of the EPA Act there is an explicit duty for a determining authority to consider the environmental impacts of activities. Section 111 provides that:

"For the purpose of attaining the objects of this Act relating to the protection and enhancement of the environment, a determining authority in its consideration of an activity shall, notwithstanding any other provisions of this Act ... examine and take into account to the fullest extent possible all matters affecting or likely to affect the environment by reason of that activity."

Relevantly, clause 228 (1) and (2) of the *Environmental Planning and Assessment Regulation 2000* (NSW) provides that "for the purposes of Part 5 of the Act, the factors to be taken into account when consideration is being given to the likely impact of an activity on the environment

include ... any cumulative environmental effect with other existing or likely future activities.”¹

Furthermore, the objects of the EPA Act (section 5(a)(vii)) include the encouragement of ecological sustainable development (**ESD**), which may be achieved, among other principles, through the implementation of the precautionary principle and inter-generational equity. Principles of ESD of themselves may have regard to environmental impacts, including cumulative ones.

There is no provision in Part 4 of the EPA Act explicitly requiring a consideration of the cumulative environmental effect in determining a development application. However, when determining a development application, the consent authority is required under section 79C(1)(b) of the EPA Act to take into account the *“likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality”*, and may be required as part of the Director-General’s requirements for the preparation of an Environmental Impact Statement under Part 4 of the EPA Act. As illustrated by the cases below, this provision allows consent authorities to have regard to cumulative impacts.

In *Drake v Minister for Planning* [2003] NSWLEC 270 two objectors challenged the determination made by the Minister granting development consent to the second respondent (Collex) to establish a waste transfer terminal at the Clyde Rail Marshalling Yards. The development was designated development. The development application related to the construction of the terminal building and the process by which domestic waste was to be compacted and placed into containers for shipment by rail to Woodlawn Bioreactor. The development application and supporting environmental assessments did not deal with the rail related operations conducted by FreightCorp.

In upholding the appeal and refusing consent, Bignold J stated, amongst other things, that there had been an inadequate assessment of environmental impact by virtue of no assessment of the cumulative environmental impact which would arise from the activities undertaken by FreightCorp over and above Collex’ activities.²

Another decision of Bignold J, *Dames and Moore Pty Ltd v Byron Council* [2000] NSWLEC 46, involved an application to remove trees to carry out infrastructure works associated with an approved community title subdivision granted 5 years earlier (**1995 consent**). The 1995 consent was granted subject to a number of conditions including that:

“no tree to be ringbarked, cut down, lopped, removed or damaged ... in contravention to the Tree Preservation Order...”

A modification application appeal to amend this condition was heard concurrently with the appeal

¹ Guidelines prepared by the Department of Urban Affairs and Planning (known now as the Department of Planning) include references to cumulative impacts, however are not considered current by the Department.

² Special legislation, being the *Clyde Waste Transfer Terminal (Special Provisions) Act 2003* (NSW) approved the development.

to remove the trees. The Court considered whether the relevant impact was the impact of the tree removal or in fact the cumulative impact of that impact together with the other impacts resulting from the carrying out of the subdivision works.

Bignold J stated, in refusing development consent, that:

“Moreover, if it is legitimate, as I consider it to be, that an assessment of environmental impact include any cumulative impact of other likely developments ... and most notably, the removal of most of the endangered vegetation in the carrying out of the 1995 approved development, then my conclusion on the unacceptability of the environmental impact is a fortiori, indeed on the undisputed evidence it is overwhelming”. [para 49]

In *Hastings Point Progress Association Inc v Tweed Shire Council; Hastings Point Progress Association Inc v Tweed Shire Council and Ors* [2008] NSWLEC 180, the Court considered whether the development consents for a Seniors Living and multi-dwelling housing development granted by the Council were valid. This case did not depend only on section 79C(1)(b) of the EPA Act. Clause 8(1)(c) of the Tweed Local Environmental Plan 2000 (**TLEP**) required the Council to be *“satisfied that the development would not have an unacceptable cumulative impact on the community, locality or catchment that will be affected by its being carried out or on the area of Tweed as a whole”*.

Pain J, in finding that the Council failed to consider clause 8(1)(c) of the TLEP, remarked that:

“assessment of cumulative impact requires that the impact of similar developments to the one proposed and the accumulation of such development and successive developments of a similar type on the community or locality be conducted ... the issue of whether a development establishes a precedent is also required. It appears that this development is the first of its type in this medium density residential zone. I accept the Applicant’s argument of what such an assessment requires ... it follows that it is not sufficient to assess the impact of the single development on the locality and community as the planner’s report does.” [para 103]

In *Gales Holdings Pty Ltd v Tweed Shire Council* [2006] NSWLEC 212, the applicant sought to undertake road haul and filling works. The question before the Court was whether a Species Impact Statement (**SIS**) was required to accompany the development application due to the potential environmental impacts on a frog colony. While Talbot J stated that the issue of cumulative impact was not a decisive one, he was of the opinion that the development of the land (that is, the filling) was likely to significantly affect the viability of the frog population requiring a further and fuller exploration to be dealt with in an SIS.

Talbot J further stated:

“A positive finding in respect of one or more of the factors in s5A does not necessarily

lead to the conclusion that an SIS must accompany the development application in accordance with s78A(8)(b) of the EPA Act. However the total extinction of the local population as contemplated in this case is considered to be sufficiently dramatic and potentially serious to demand that a full and proper study be undertaken so that the process of the consideration of the development application is fully and adequately informed in respect of that issue.” [para 45]

In *Anderson v Director-General, Department of Environment and Conservation* (2006) 144 LGERA 43³, the applicants (traditional owners of the Numbahjing Clan within the Bundjalung Nation) claimed a section 90 consent granted under the NPW Act by a representative of the Director-General to destroy Aboriginal objects, failed to consider relevant matters. The respondents sought the section 90 consent in order to develop the site as a residential estate.

Section 90 of the NPW Act provided:

(1) A person who, without first obtaining the consent of the Director-General, knowingly destroys, defaces or damages, or knowingly causes or permits the destruction or defacement of or damage to, an Aboriginal object or Aboriginal place is guilty of an offence against this Act.

....

(2) The Director-General may give consent for the purposes of subsection (1) subject to such conditions and restrictions ...

Other objects of Aboriginal significance had been destroyed as a result of a subdivision consent granted in the early 1990s.

Pain J, said:

“it would appear that a consideration of the cumulative impact of destruction of Aboriginal objects of significance to Aboriginal traditional owners is relevant to the assessment of significance of particular objects to any s90 consent application. I consider there has been a failure on [Director-General representative] part to take into account the significance of the objects in this context and that this is a relevant consideration to which he should have had regard before issuing the s 90 consent.”
[para 200]

³ This decision was appealed to the New South Wales Court of Appeal and dismissed: *Anderson and Another v Director-General, Department of Environmental and Climate Change and Another* (2008) 163 LGERA 400.

Other related proceedings: *Anderson v Director-General of the Department of Environment and Climate Change* [2008] NSWLEC 182; *Anderson on behalf of Numbahjing Clan within the Bundjalung Nation v NSW Minister for Planning* [2008] NSWLEC 120; *Anderson v Minister for Infrastructure Planning and Natural Resources* (2006) 151 LGERA 229.

The above cases show that cumulative environmental impacts, namely the likely impacts of proposed development when seen in the context of the environmental impacts of previous or contemporaneous (and possible likely future) developments in the vicinity of a proposed development (and possibly also in a wider context), will increasingly be taken into account by consent authorities, including the Land and Environment Court. In fact, a failure to do so, may also lead to grounds upon which a Court may ultimately invalidate a development consent.

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