

## 1. Environmental Regulation of Mining Resources

### 1. Production v Sustainability

- a. Development of adequate energy services for basic human welfare and economic needs is a global imperative (UN and World Energy Council Report)
  - i. Need is qualified by the fact that the use of energy should not endanger the quality of life of current and future generations and should not exceed the carrying capacity of ecosystems.
- b. More development needs to go to sustainable methods of energy production

### 2. Kyoto Protocol

- a. Key objective: to contain emissions of the main human-emitted greenhouse gases in ways that reflect underlying national differences in emissions, wealth and capacity to make reductions.
  - i. First commitment period has ended
- b. Ultimate objective: to stabilize GHGs in the atmosphere at a level that would stop dangerous human interference with the climate.

### 3. Australia's Approach

- a. *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) (EPBCA)
  - i. Act is triggered where an action has or will have a significant material impact on matters of national environmental significance – see p.45.
    - 1. Action is defined to include things such as projects, developments, undertakings, activities or alterations to any of those things, and must which must be approved before they can be undertaken pursuant to the relevant section of the Act.
  - ii. 'controlled action':
    - 1. Actions likely to have a significant impact on a matter of national environmental significance
    - 2. Actions likely to have a significant impact on the environment of Cth land
    - 3. Actions by the Cth government or a Cth agency likely to have a significant impact on the environment (including actions taken by the government outside Australia)
  - iii. 'Impact of an action' also includes indirect impacts which are
    - 1. Facilitated, to a major extent, by the action and
    - 2. Are within the contemplation of the person taking the action and
    - 3. Are reasonably foreseeable.
  - iv. 'Significant' is not defined; the general test is whether the impact is 'important, notable, or of consequence, having regard to its context or intensity' (*ACF v Minister for Planning*).

### 4. Environmental Impact Assessment/Statement

- a. EIA:
  - a systematic process for the examination and evaluation of the environmental effects of proposed activities that are considered likely to significantly affect the environment.
- b. EIS:
  - a document prepared to describe the potential impacts of a proposed activity on the environment to inform decision-makers and the general public about the predicted outcomes of the activity, and what will be done to manage the effects.

- c. Cth EPBC
  - i. The need for an EIA is dependent upon the Minister forming the opinion that the proposed activity is significant enough
  - ii. The determination of the need for an EIS can only be made where there has been a prior referral of a proposed activity to the relevant assessing authority
- d. Vic + NSW
  - i. An EIS may be automatically triggered if a proposal activity is of a certain type or falls within a certain class of proposal
  - ii. The *Environmental Effects Act 1978* (Vic) provides that an environment effects statement (EES) must be submitted by the proponent to the Minister in respect of all public works proposals that are declared by the Minister as being capable of having significant effects on the environment.
- e. Criticisms:
  - i. See p. 16 revision notes.
- f. Emerging forms of energy production
  - i. The focus of the EPCBA is on the protection of heritage areas and protected species; the new CSG water resource impact trigger alleviates some of this imbalance and will result in most CSG proposals needing to be referred to the Cth Minister.

5. **Decision in *ACF v Minister for Planning* [2004]**

- a. Concerned the scope of the relevant considerations in assessing a planning scheme to extend the operating life of the Hazelwood Power Station. Issue was whether a planning panel appointed under the *Planning and Environment Act* could refuse to consider the environmental impacts of GHGs resulting from continued operation.
- b. Held: Morris J
  - i. s24 requires the panel to consider all relevant submissions; whether a submission is relevant requires reference to the provisions of the Act and the content of the amendment in question.
  - ii. There was a sufficient nexus between the approval of the amendment and the environmental effect of GHGs that are likely to be produced by the use of the power station.
  - iii. Terms of reference cannot be given by a Minister to a panel in its role determining amendments under the terms of the Act and the panel should therefore not have felt bound by them in performing that role.

### **Factual Scenario: Establishing a CSG plant**

- 1) Will have to produce an EES/EIS in accordance with the relevant jurisdictional legislation.
  - a. Matter will be referred to the Cth minister for assessment under the EPBC once the CSG trigger comes through.
  - b. EIS is merely a guide and not compelling, authoritative or enforceable. Predictions do not create legally enforceable obligations against the proponent.
  - c. Decision maker is not bound to follow the recommendations
- 2) Failure to evaluate matters that should have been in an EIS, but were not, can lead to the proposal being declared unlawful as in *ACF v Minister for Planning*.
  - a. Failure to include accurate details will not result in any direct penalty but may result in the decision to approve being unlawful, which will add to the time needed to execute the proposal and thus increase general pre-operation administrative costs.