The Future

Whether these issues turn out to be dealt with either in the pending High Court appeal in the *Croker Island Case* or in legislation by Parliament is at this stage speculative, but the issues are clear:

- If it is not necessary to expand the Crown's radical title beyond low water mark in order to sustain the common law's recognition of native rights below that mark, what justification is there for using the absence of "radical title" as the reason for withholding offshore petroleum exploration permits from constitutional protection under section 51(xxxi) of the Constitution?
- If native title claims are recognised and protected below low water mark, so that they then enjoy protection under the *Native Title Act* from being acquired without compensation , why is similar protection not afforded to offshore rights under the *Petroleum (Submerged Lands) Act*?

The second issue is a matter for Government and the Parliament to consider, rather than the High Court. The proper concern in the *Native Title Act* to provide for compensation for various ways in which native title has been or can be affected contrasts strangely with the silence of the Parliament on offshore petroleum rights.

CHALLENGING COAL SUPPLY CONTRACTS - THE NEW SOUTH WALES EXPERIENCE*

INTRODUCTION

The conventional way for seeking to revise the terms of a contract is to try and find a breach of that contract and then threaten termination unless the terms of the contract are varied. As an alternative, misleading conduct may be claimed.

As the power industry becomes more competitive, there are pressures on owners of power stations to reduce their costs. One of the components in the cost structure of a coal fired power station is the cost of coal. There are a number of long term coal supply contracts that have been entered into in New South Wales by Pacific Power in the late 1980's and early 1990's. Those contracts contained prices for coal which are well above current market prices. Cost reduction programs have led power station owners to review their coal supply contracts and seek to reduce their coal price. The coal price reductions may occur through negotiation and mutual agreement by the parties, or where the coal supplier has not agreed to a price reduction, through attempts to call breaches of contract and then seeking to terminate contracts based on those breaches in the expectation that this will lead to an agreed coal price reduction.

A number of cases which follow this pattern have found their way into the New South Wales Court system over the last 18 months. Those cases are *Peabody Resources Limited* v. *Macquarie Generation* and *Renison Limited* v. *Macquarie Generation* which were heard and decided together (and which are currently on appeal to the Court of Appeal) and *Novacoal Australia Pty Limited* v. *Macquarie Generation.*

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In these cases, Macquarie Generation inherited long term coal supply contracts from Pacific Power for supply of coal to power stations that were transferred to Macquarie Generation under statutory transfer orders. A summary of each case appears below.

Peabody Resources Ltd v. Macquarie Generation; Renison Limited v. Macquarie Generation

(Supreme Court of New South Wales, Commercial Division, Einstein J, 19 November 1998)

Background

Following an Electricity Commission of NSW tender process, Renison Ltd and Peabody Resources Ltd (as parties to the Narama Joint Venture) were awarded and entered into a contract (Contract 4007C) in June 1990 with the Electricity Commission for the supply of coal from the Narama Mine to the Bayswater and Liddell power stations from 1 January 1993 to 31 December 2012.

In 1996, by a statutory transfer order, Contract 4007C was transferred to Macquarie Generation.

Coal was supplied under the contract from 1993.

In October 1997 Macquarie Generation purported to rescind Contract 4007C for alleged misrepresentation in relation to estimated employment levels provided to the Electricity Commission during the tender process.

Macquarie Generation also alleged that Contract 4007C was not validly transferred from Pacific Power to Macquarie Generation (but this argument was abandoned by Macquarie Generation shortly after the commencement of proceedings).

It was against this background that Macquarie Generation refused to pay for coal delivered from October 1997 at the full price under Contract 4007C. From October 1997 Macquarie Generation paid for coal deliveries at a lower price.

The Proceedings

Renison and Peabody, in separate proceedings commenced in 1997 in the Supreme Court (but which ultimately were heard together) sued for the unpaid amounts in relation to coal supplied under the contract.

In answer to Renison/Peabody's claim for unpaid money under the contract, Macquarie Generation filed a cross-claim against Renison and Peabody in which the allegations set out below were made.

Macquarie Generation's arguments

Macquarie Generation originally put 3 arguments in relation to Contract 4007C, as follows:

(1) Misrepresentation claim

It was alleged that the Narama Joint Venture did not reveal that its estimate of employment levels provided to the Electricity Commission had been substantially reduced before the contract was entered

into. This was the only argument that Macquarie Generation ultimately pursued in the proceedings. As indicated, Macquarie Generation's other arguments were abandoned during the trial.

The misrepresentation case revolved around a letter from a Peabody officer on behalf of the Narama Joint Venture to the Electricity Commission dated 16 November 1989 which described the proposed workforce of the Narama Mine during the period 1991 to year 2005. For the period 1993 to 2000 the workforce was estimated to be a particular number.

Macquarie Generation alleged that, in fact, the workforce turned out to be considerably less and that, had the Electricity Commission been aware that the tender submitted by the Narama Joint Venture would have involved no increase in the number of employees engaged at the Ravensworth South/Narama mine, the possible result would have been that the tender may not have been awarded to the Narama Joint Venture.

Macquarie Generation argued that, because of the alleged effect of the labour figures on the price fluctuation provisions of the contract, more had been paid for deliveries of coal than ought to have been the case had the "correct" labour figures been provided.

(2) Reasonable estimate [this argument was abandoned]

Macquarie Generation alleged a breach of a term of Contract 4007C to the effect that the figures in the Joint Venture tender and the final offer for inclusion in the price fluctuation provisions would reflect the Joint Venture's reasonable estimate of actual employment costs.

(3) Failure to notify [this argument was abandoned]

Macquarie Generation alleged a breach of a term of the contract allegedly obliging the Joint Venturers to notify the Electricity Commission or Macquarie Generation that any index or price source used in the labour index figure became inappropriate.

Even though Macquarie Generation abandoned the reasonable estimate and failure to notify arguments, the interpretation of the contract was still relevant to the question whether the contract was a contractor's risk contract. This in turn was relevant to whether there had been any misrepresentation.

The Court's findings

The contract was held to be a contractor's risk contract. The Court accepted that the contractor's actual costs of labour or other factors of production and the contractor's actual profit through performance, have no relevance to the operation of the contract. It was not a "cost plus" contract. The Court also took into account that the contract had to be commercially workable which would not be the case if the contractor was obliged to disclose actual costs.

Ultimately, it was not contended by Macquarie Generation that the labour estimate was false when made on 16 November 1989.

The Court found that:

(1) Macquarie Generation failed to establish that the Joint Venture, between 16 November 1989 and 29 June 1990, in fact made any lower estimate of additional employees to be required in 1993 – 2000.

(2) In any event, it was not proved that the Joint Venture's manning level estimates in November 1989 were a material matter in the Electricity Commission's decision to award the contract to the Narama Joint Venture. The Court took into account the nature of the contract, the fact that there were no negotiations on costs, and the fact that it was a competitive tender.

(3) The estimate of 16 November 1989 was not a continuing estimate. It was clearly limited to being an estimate as at 16 November 1989 and there was no obligation on the Narama Joint Venture to update the estimate immediately prior to the execution of the contract.

(4) Even if it did continue, the representation was not material and did not induce the Commission to enter the contract. None of the Commission's tender analyses took the actual labour figures into account.

(5) If the estimate had changed, the Commission would still have entered into the contract on the same terms. This was because the Court found that where the Electricity Commission's officers sought manning estimates, they did so in order that the relevant Minister could answer questions in Parliament.

(6) In order to secure long term contracts of sufficient quantities of coal, the Electricity Commission had to accept either the Narama Joint Venture's tender, or a tender by Hebden Mining Company; however, for various reasons there was no way the Electricity Commission would have accepted the Hebden tender whether or not the labour figures estimated by the Narama Joint Venture were correct.

(7) In the context of this particular contract, the labour force figure was a *representative* figure for the price fluctuation provisions of the contract, not an actual figure in relation to labour estimates and costs as alleged by Macquarie Generation.

In the result, no conduct of the Joint Venturers was misleading or deceptive or likely to mislead or deceive, but if it had been, it would have made no difference to the decision of the Electricity Commission to award the contract to the Narama Joint Venture.

Appeal

Macquarie Generation has appealed the decision to the Court of Appeal.

Novacoal Australia Pty Limited v. Macquarie Generation

(Supreme Court of New South Wales, Equity Division, Commercial List, Bergin J, 14 September 1999)

Background

In 1990, the Electricity Commission signed a contract with BP Coal Development Australia Pty Limited (since renamed Novacoal Australia Pty Limited) (Novacoal) to deliver 2.5 million tonnes of coal per annum plus or minus 20% for a term from 1 January 1991 to 31 December 2010. The price under the contract was approximately \$1.48 per gigajoule, subject to contractual adjustments. The contract contained certain specifications and the price was based on a dollar amount per tonne of coal delivered. In 1997, Macquarie Generation sought variations to the contract and negotiated an interim agreement under which coal was supplied at an increased ash level with supply based upon an energy or gigajoule basis rather than a volume basis at a price of \$1.38 per gigajoule. A second interim agreement operated during

1998. Macquarie Generation sought a further interim agreement for 1999 but Novacoal did not agree to the price of $1.20 per gigajoule proposed by Macquarie Generation and in those circumstances the parties reverted to the original contract containing a higher price for the coal.

The contract included standard Pacific Power contract provisions to the effect that if the coal supplier delivers coal outside of various specifications then the buyer has a discretion to accept it and apply penalty provisions to the price or it may reject it by suspending deliveries until satisfied that the supplier's proposal for the delivery of coal in the future will be within the specified ranges in the specifications. One particular requirement was that the coal have handleability characteristics within a specified limit. A sampler located on a conveyor was used to test for compliance with this specification.

During the first 8 months of 1999, Macquarie Generation exercised its right to suspend coal deliveries on a number of occasions because the coal deliveries were said to be outside the ranges required by the original contract or the interim agreement. The reasons for the suspension varied but included the total moisture being beyond specifications, sulfur content beyond limits and the Hardgrove Grindability Index (HGI) was above permitted limits and on each occasion Macquarie Generation reserved its rights in respect of the out of specification deliveries.

Injunction sought

Macquarie Generation suspended delivery of coal on 24 August 1999. Novacoal applied for an injunction that Macquarie Generation cease the suspension of deliveries of coal by Novacoal which it commenced on 24 August 1999 on the basis that the suspension was not authorised by the contract.

As usual, the Court had to consider whether there was a serious question to be tried and whether damages was an adequate remedy.

No serious question to be tried

The Court considered whether there was a serious question to be tried in respect of the validity of the suspension of 24 August 1999. That suspension relied on the HGI being beyond specification. There were claims of a defective and unreliable sampler but the Court indicated that the evidence from experts was clear that notwithstanding the non-compliance of the sampler with Australian Standards and the unreliability of the readings it was highly unlikely that the delivered coal would be within the range required by the interim agreement and that consequently Macquarie Generation had the right to suspend.

Novacoal submitted that Macquarie Generation was acting unreasonably and in bad faith in suspending coal deliveries because the real purpose was to raise technical objections to the supply of coal under the contract in order to bring about a renegotiation of the coal price and that it had an obligation to act reasonably. The Court concluded there was a strong case that Macquarie Generation had an obligation to exercise the power to suspend deliveries reasonably.

However the Court found that there was not a serious question to be tried on this point because in the circumstances Macquarie Generation had acted reasonably. Those circumstances were that under the interim agreement of 16 June 1999, Novacoal had agreed to deliver coal with HGI within the range 44-54, Novacoal had received notification from Macquarie Generation that on 12 occasions the coal delivered between 21 June 1999 and 23 August 1999 was outside the agreed range, Macquarie Generation reserved its position in respect of those readings and no suspension occurred until HGI readings were at least 68.

Novacoal also contended that Macquarie Generation was estopped from suspending deliveries for non-compliance because of its acceptance of coal with such characteristics in the past and that in reliance on that conduct Novacoal had organised its affairs in a particular way including in particular the very large expenditure on its coal preparation plant and equipment. The Court noted that Macquarie Generation had made it abundantly clear that it would require strict compliance with the contract in the interim agreement of 16 June 1999. The Court concluded that any estoppel that may have been extant as at June 1999 was jettisoned by the interim agreement of the parties on 16 June 1999 which contained that clear statement.

Damages adequate

The Court also added that damages would have been an adequate remedy for Novacoal and that, consequently even if a serious question to be tried could have been established, an injunction would still not have been issued. The main submission advanced on damages not being adequate was that Novacoal could not pursue other contracts because it had to effectively stand at the ready to deliver to Macquarie Generation when the suspension was lifted and in those circumstances it was not possible to quantify what Novacoal had lost in that period of standing at the ready. The Court indicated that while this submission looked attractive at first blush the commercial realities of the capacity of Novacoal tempered its attractiveness. Novacoal had the capacity to explore other ventures and sell coal to others notwithstanding its contractual obligations to Macquarie Generation. In those circumstances, it was concluded that damages was an adequate remedy.

Result

The application for an injunction was refused.

FREEDOM OF CHOICE OR FREEDOM FROM CHOICE? - COLLECTIVE BARGAINING AND INDIVIDUAL WORKPLACE AGREEMENTS IN THE PILBARA

Steven Amendola*

Australian Workers Union v BHP Iron Ore Pty Ltd [1]

A dispute arose out of a decision by BHP Iron Ore Pty Ltd ("BHP") to pursue individual agreements with its iron ore workers in the Pilbara region of Western Australia. There had been much publicity over this issue and the assertion of a right to collectively bargain.

The applicants sought interlocutory injunctive relief in the Federal Court, to stop BHP from continuing to offer individual agreements to its workforce in the Pilbara.

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* Dunhill Madden Butler, Melbourne. The assistance of Yi Foong Ng is acknowledged.

1 [2000] FCA 39, Gray J, 31 January 2000.