

Supreme Court upholds validity of per-cubic metre contribution as condition of extractive industry

By Peter Wittkuhn

The Western Australian Supreme Court has upheld the validity of conditions imposed on planning consents and extractive industry licences, under which an extractive industry proponent was required to pay a contribution calculated on the value of material extracted.

In **Carbone Bros Pty Ltd v Shire of Harvey** [2014] WASC 284, the conditions were expressed as requiring a 'levy' to be paid for the maintenance and/or upgrade of a named road or pair of roads, being roads which the extractive industry proponent needed to use in order to access its extractive industry site. In each case, the named roads were roads over which the Shire had care, control and management.

Carbone Bros asserted that the conditions were in the nature of a tax and were beyond the power of the Shire to impose. Justice Jenkins rejected that argument. The crux of Her Honour's decision is found at paragraph [45] of the reasons:

- (1) the plaintiff did not dispute that the Town Planning Scheme was valid;
- (2) the Scheme required the plaintiff to obtain planning consent for its quarrying operations within the Shire;
- (3) the Shire may grant planning consent subject to such conditions as it thinks fit;
- (4) conditions which require a financial contribution to 'assist in the maintenance and upgrade' of named Shire roads which are used in connection with the plaintiff's quarrying activities were for a planning purpose. This was because the maintenance and upgrade of the roads was reasonably capable of being regarded as related to the care, control and management of roads for which the Shire has responsibility. Further, the care, control and management of the roads is affected by the extractive industry developments the subject of the planning consents;
- (5) for the same reasons, such conditions reasonably and fairly relate to the plaintiff's quarrying operations;
- (6) such conditions were not so unreasonable that no reasonable planning authority could have imposed them. It is reasonable for a local government to seek to obtain a financial contribution towards the maintenance and upgrade of roads directly affected by applications for planning consent for developments; and

(7) there is an obvious connection between quarrying activities which affect the use of roads and conditions on related planning consents which require the proponent to make a reasonable contribution to assist in defraying the costs incurred in remediating that affect.

Justice Jenkins also distinguished the case from an important 1966 High Court of Australia decision, ***Marsh v Shire of Serpentine Jarrahdale*** 120 CLR 572. In ***Marsh***, the Shire had adopted by-laws which expressly required the payment of a licence fee based solely on the volume of material extracted. Her Honour pointed out that the High Court in ***Marsh*** found that the challenged licence fee was nothing more than a means of increasing the local government's funds, or of participating financially in the licensee's quarrying operations. By contrast, the contribution required from Carbone Bros was expressed as being a contribution to the maintenance of particular roads, and importantly, Carbone Bros did not assert that the condition lacked a nexus to the particular development, being the particular extractive industries. Carbone Bros is pursuing an appeal against Justice Jenkins' decision.

Implications of the *Carbone Bros Pty Ltd v Shire of Harvey* decision

As the law currently stands, a planning condition imposed upon an extractive industry which requires a monetary payment to be made, calculated by reference to the volume of material actually extracted, is not inherently beyond power or unreasonable.

It is important to note that the plaintiff in the ***Carbone Bros*** litigation was not alleging that the condition lacked a nexus to the development; and the plaintiff was not alleging that the condition was so unreasonable that no reasonable planning authority could impose it.

The plaintiff in ***Carbone Bros*** chose to bring its challenge in the Supreme Court. As such, the plaintiff could only argue grounds going to the legal validity of the condition, that is, whether it was within the *legal power* of the local government to impose it. For challenges brought in the State Administrative Tribunal, on the other hand, local governments must of course be prepared to defend a contribution *on the merits* as well as the legality. As such, not every condition based on the volume of material extracted will necessarily survive challenge, if it is not calculated on a methodology that is sound and fair having regard to all circumstances.

For further information in regard to the above, contact Peter Wittkuhn on 9424 6220 or pwittkuhn@mcleods.com.au. The information contained in this article should not be relied upon without obtaining further detailed legal advice in the circumstances of each case.